

DOCKET



SUPREME COURT

OF THE UNITED STATES

No. 11-10189

*** CAPITAL CASE ***

Title:

Carlos Trevino, Petitioner

v.

Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Docketed:

May 7, 2012

Lower Ct:

United States Court of Appeals for the Fifth Circuit

Case Nos.:

(10-70004)

Decision Date:

November 14, 2011

Rehearing Denied: January 31, 2012

Questions

Presented

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

- Apr 30 2012 Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 6, 2012)
- Jun 5 2012 Order extending time to file response to petition to and including August 6, 2012.
- Jun 6 2012 Brief amici curiae of Former Federal Judges filed.
- Aug 6 2012 Brief of respondent Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed.
- Aug 16 2012 DISTRIBUTED for Conference of September 24, 2012.
- Aug 30 2012 DISTRIBUTED for Conference of September 24, 2012.
- Sep 1 2012 Reply of petitioner Carlos Trevino filed. (Distributed)
- Oct 11 2012 DISTRIBUTED for Conference of October 26, 2012.
- Oct 29 2012 Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Question 1 presented by the petition.
- Dec 6 2012 Consent to the filing of amicus curiae briefs , in support of either party or of neither party, received from counsel for the respondents.
- Dec 13 2012 Joint appendix filed. (Statement of costs filed.)
- Dec 13 2012 Brief of petitioner Carlos Trevino filed.
- Dec 18 2012 SET FOR ARGUMENT ON Monday, February 25, 2013.
- Dec 19 2012 Brief amici curiae of University of Texas School of Law Capital Punishment Clinic, et al. filed.
- Dec 20 2012 Brief amicus curiae of State Bar of Texas in support of neither party filed.
- Jan 4 2013 CIRCULATED.
- Jan 14 2013 Brief of respondent Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. (Distributed)
- Jan 16 2013 Record received from U.S.C.A. for 5th Circuit. (1 box)

Jan 22 2013 Brief amici curiae of Utah and 24 Other States filed. (Distributed)

Jan 22 2013 Brief amici curiae of Families of Linda Salinas and Other Crime Victims filed.  
(Distributed)

Jan 22 2013 Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)

Jan 30 2013 Record from U.S.D.C. for Western District of Texas is electronic.

Jan 30 2013 Supplemental Record (sealed documents) recieved from U.S.D.C. for Western District of Texas.

Feb 13 2013 Reply of petitioner Carlos Trevino filed. (Distributed)

Feb 25 2013 Argued. For petitioner: Warren A. Wolf, San Antonio, Tex. For respondent: Andrew S. Oldham, Deputy Solicitor General, Austin, Tex.

Mar 1 2013 Motion to appoint counsel filed by petitioner Carlos Trevino.

Mar 13 2013 Motion DISTRIBUTED for Conference of March 29, 2013.

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**PETITION  
FOR  
WRIT OF  
CERTIORARI**

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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CARLOS TREVINO,

*Petitioner,*

V.

RICK THALER,

Director, Texas Department of Criminal Justice,  
Correctional Institutions Division,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

### CAPITAL CASE

1. In federal habeas proceedings, undersigned counsel raised for the first time a claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), that trial counsel were ineffective for failing to investigate the extraordinary mitigating evidence in Mr. Trevino's life. The federal proceeding was stayed to allow exhaustion, but the Texas Court of Criminal Appeals dismissed Mr. Trevino's *Wiggins* claim under state abuse of the writ rules. Thereafter, the federal district court dismissed the claim as procedurally barred, finding no cause for the default. On appeal, Mr. Trevino argued that the Court of Appeals should stay further proceedings until this Court resolved the question then-pending in several cases whether ineffective assistance of state habeas counsel in failing to raise a meritorious claim of ineffective assistance of trial counsel established cause for the default in state habeas proceedings. The Court of Appeals refused to stay Mr. Trevino's appeal for this purpose. Four months later, this Court decided in *Martinez v. Ryan*, 132 S.Ct. 1309 (March 20, 2012), that ineffective assistance of state habeas counsel in the very circumstance presented by Mr. Trevino's case could establish cause for the default of a claim of ineffective assistance of trial counsel. These circumstances present the following question:

Whether the Court should grant certiorari, vacate the Court of Appeals' opinion, and remand to the Court of Appeals for consideration of Mr. Trevino's argument under *Martinez v. Ryan*?

2. Mr. Trevino raised a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that

the trial prosecutor suppressed a statement to the police by a codefendant to the effect that Trevino did not commit the capital murder. To rule against this claim, the panel majority in the Court of Appeals—without notice to Mr. Trevino or his counsel—conducted its own investigation of the separate trial court record of this codefendant, found a subsequent statement by him contradicting his exculpatory statement, took judicial notice of the statement and used it as the basis for affirming the district court's denial of Mr. Trevino's *Brady* claim. The panel majority acknowledged the lack of notice to Trevino, but said that he could be heard by petition for rehearing. Trevino presented arguments on rehearing and on rehearing en banc, but both were summarily denied. These circumstances present the following question:

Whether the Court of Appeals' denial of notice and an opportunity to be heard on a matter that is determinative of a meritorious *Brady* issue requires the Court's exercise of its supervisory powers to assure that Mr. Trevino is afforded a fair opportunity to be heard on appeal?

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All parties appear in the caption on the cover page

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No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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CARLOS TREVINO,  
*Petitioner,*

V.

RICK THALER,  
Director, Texas Department of Criminal Justice,  
Correctional Institutions Division,  
*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

**PETITION FOR WRIT OF CERTIORARI**

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Carlos Trevino respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court's denial of Mr. Trevino's writ of habeas corpus is not reported, but is included as Appendix A. The memorandum opinion of the federal district court denying Mr. Trevino's writ of habeas corpus is not reported, but is included at Appendix B. The opinion of the Texas Court of Criminal Appeals denying Mr. Trevino's initial state writ of habeas

corpus is not reported, but is included at Appendix C. The opinion of the Texas Court of Criminal Appeals denying Mr. Trevino's subsequent writ of habeas corpus is not reported, but is included at Appendix D. The decision of the United States Court of Appeals for the Fifth Circuit denying Mr. Trevino's Petition for Rehearing and Petition for Rehearing en banc is not reported, but is included at Appendix E. The Texas Court of Criminal Appeals decision denying Mr. Trevino's direct appeal is reported at *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999), and included at Appendix F.

### **JURISDICTION**

The Court has jurisdiction to entertain this petition for writ of certiorari pursuant to 28 U.S.C. §1254(1). The court of appeals rendered its decision sought to be reviewed on November 14, 2011. See Appendix A. Mr. Trevino's petitions for rehearing and for rehearing en banc were both denied on January 31, 2012. See Appendix E.

### **CONSTITUTIONAL PROVISIONS INVOLVED**

The Sixth Amendment to the United States Constitution provides in relevant part:

"In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel in his defence."

The Fifth Amendment to the United States Constitution provides in relevant part:

"No person shall be ... deprived of life, liberty, or property, without due process of law."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

"No State shall ... deprive any person of life, liberty, or property, without due process of law."

## STATEMENT OF THE CASE

### A. STATEMENT OF FACTS

The statement of facts from Mr. Trevino's trial is substantially set forth in the federal district court's opinion in *Trevino v. Thaler*, No. SA-01-CA-306-XR (W.D. Tex. December 21, 2009), Appendix B at 1-10.

In summary, Petitioner Carlos Trevino was a back seat passenger in a vehicle of five young men in San Antonio, Texas on the evening of June 9, 1996. While stopped at a gas station, one of the men, Santos Cervantes, encountered Ms. Linda Salinas, with whom he was acquainted. Mr. Cervantes invited Ms. Salinas to join them in their vehicle, and she accepted. Mr. Cervantes and Ms Salinas began sexually-intimate interactions with each other shortly after she got in the car. AS she sat in Mr. Cervantes' lap in the front passenger seat, Mr. Cervantes proceeded to strip her naked from the waist up. Mr. Cervantes had offered to take Ms. Salinas to a nearby fast-food restaurant. Instead, he directed the driver to go to a secluded park, where one, or two, or more of the men—statements of the co-defendants are conflicting—took Ms. Salinas out of sight. She was subsequently sexually assaulted and murdered. Her body was discovered the following day. The autopsy showed that Ms. Salinas died as a result of stab wounds to the neck.

The evidence elicited at trial convinced the jury that Mr. Trevino was among that group, and that he was involved in Ms. Salinas' murder. The central witness for the state at



trial was one Juan Gonzales, who was a juvenile at the time of the murder. While he was indisputably present at the scene, was identified by the trial court in the jury instructions as an "accomplice as a matter of law," and was on juvenile felony probation at the time, he was never charged in connection with the murder, nor was any action taken with regard to his probationary status. (There was no evidence revealed, nor any record uncovered, indicating that Juan Gonzales was ever offered immunity or any promise of leniency in return for his testimony.)

The state also presented forensic fiber and DNA evidence allegedly linking Mr. Trevino to the scene. The fiber evidence showed that the fibers involved were "similar to" those from Mr. Trevino's clothing. The DNA expert testified that a blood sample from Ms. Salinas' underwear contained a mixture of DNA, and that Ms. Salinas and Mr. Trevino could not be excluded as the contributors of that evidence. (During the subsequent federal habeas proceedings, federal habeas counsel had that underwear sample retested by an independent laboratory, which found the clothing contained neither blood nor DNA evidence.)

The defense presented no witnesses at the guilt-innocence phase of trial.

At the punishment phase of the trial the state presented, among other evidence, testimony regarding Mr. Trevino's prior convictions, and of his gang membership. His convictions were shown to be non-violent. The only evidence of Mr. Trevino's gang activity was that he first joined a gang while in prison. The defense offered no witnesses, lay or otherwise, to counter the impression left by the state that mere gang membership or

association while in prison equated with either commission of, or character for, violent behavior. Mr. Trevino's defense team presented only one witness, his aunt, who testified regarding her knowledge of Mr. Trevino's life, and disputed his ability to commit capital murder. The jury deliberated approximately eight hours, before returning a verdict which resulted in the trial court subsequently pronouncing a sentence of death.

## **B. PROCEEDINGS BELOW**

Mr. Trevino was convicted and sentenced to death for his part in the sexual assault and murder of Linda Salinas in San Antonio, Texas on June 9, 1996.

Mr. Trevino was represented on direct appeal and initial state habeas proceedings by two different appointed counsel (neither of which was current counsel). Initial state habeas counsel, working alone without assembling a defense team of investigation, mitigation or any other experts or support specialists, filed an initial state writ of habeas corpus, raising only record-based claims. That initial state writ of habeas corpus was denied by the Texas Court of Criminal Appeals in an unpublished opinion, *Ex parte Trevino*, WR-48,153-01 (Tex. Crim. App. April 4, 2001), included at Appendix C. That initial state writ of habeas corpus raised, among other issues, eight claims of denial of effective assistance of trial counsel. However, all of those claims were based on evidentiary issues shown in the trial record. None were the result of an independent investigation of the facts or issues conducted by state habeas counsel, or of an independent review by state habeas counsel of how trial counsel's investigation and subsequent preparation compared to such an investigation.

State habeas counsel was continued on appointment by the federal district court as federal habeas counsel. Shortly after filing an initial federal habeas petition, again containing only record-based claims, that counsel withdrew, citing an inability to continue in that capacity for psychological and physical health reasons. Newly appointed federal habeas counsel (and current counsel of record) conducted an independent investigation of the facts and issues in accordance with established precedent and pertinent performance standards. That investigation disclosed a previously unidentified *Brady* claim, potentially affecting both the guilt-innocence and punishment phases of trial, along with a claim of ineffective assistance of trial counsel in failing to identify and effectively use the document that was at the core of the *Brady* claim.<sup>1</sup> The investigation also led to a previously unidentified *Wiggins* claim—a near total failure of trial counsel to investigate, develop and present mitigating evidence.

The federal district court permitted Mr. Trevino to return to state court twice, in an effort to exhaust those newly discovered claims. On his first return to state court, Mr.

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<sup>1</sup>The facts giving rise to the *Brady* claim were these: Three of the four men that were in the car that night with Mr. Trevino gave statements to the police variously implicating Trevino in the sexual assaults and/or the murder of Ms. Salinas. Only one, however, Juan Gonzalez, testified against Trevino. The fourth man, Seanido “Sam” Rey, at first told the police he knew nothing about what happened. He then gave a second statement exculpating Trevino from the murder. Finally, he gave a third statement implicating Trevino in the murder.

In the course of their investigation, undersigned counsel discovered the second statement in a prosecution file (but did not find the third statement), learned from trial counsel that they had not seen the second statement, and then claimed that the prosecution had suppressed the statement in violation of *Brady*, and that the statement was material because it contradicted the account of the murder by the prosecution’s chief witness.

Trevino's *Wiggins* claim was rejected by the Texas Court of Criminal Appeals on state abuse-of-the-writ grounds in an unpublished opinion. See Appendix C. The second return involved an effort to exhaust the newly discovered *Brady* and associated ineffective assistance claims. After the responsible state judicial officer refused to take any action to deal in any manner at all with those claims for over two years, the federal district court found the state habeas process wholly ineffective to protect Mr. Trevino's rights pursuant to 28 U.S.C. §2254(b)(1), and excused the failure to exhaust the *Brady* and associated ineffective assistance claims in state court.

In a memorandum opinion, the federal district court subsequently denied all claims, finding the *Wiggins* claim to be procedurally defaulted, and the evidence in the *Brady* and associated ineffective assistance claims to not meet the materiality requirement of *Brady*. *Trevino v. Thaler*, No. SA-01-CA-306-XR (W.D. Tex. December 21, 2009), included at Appendix B. However, it granted Certificates of Appealability on all three claims.

With regard to the *Wiggins* claim, the district court explained that:

While a showing of ineffective assistance can satisfy the "cause" prong of the "cause and actual prejudice" exception to the procedural default doctrine, petitioner cannot rely upon the allegedly deficient performance or even "ineffective" assistance of his first state habeas corpus counsel as a basis for excusing his failure to present this aspect of his ineffective assistance claims herein to the state courts during petitioner's first state habeas corpus proceeding. A negligent failure or a malicious refusal by a convicted defendant's state habeas counsel to present a potentially meritorious claim in the course of the defendant's state habeas corpus proceeding effectively precludes federal habeas review of that claim, unless the defendant can satisfy the fundamental miscarriage of justice exception to the federal procedural default doctrine. See *Ruiz v. Dretke*, 2005 WL 2146119, \*14 (W.D. Tex. August 29, 2005) (holding a state habeas counsel's inexplicable failure to assert glaringly obvious grounds for state habeas corpus relief constituted a procedural barrier to federal habeas review of those

same unexhausted claims), affirmed, 460 F.3d 638 (5th Cir. 2006), *cert. denied*, 549 U.S. 1283 (2007). Infirmities in state habeas corpus proceedings, even those that arise exclusively from the gross incompetence of a petitioner's state habeas counsel, do not constitute grounds for federal habeas relief and are insufficient to excuse a federal habeas petitioner's procedural default on a federal constitutional claim. *Ruiz v. Dretke*, 460 F.3d 638, 644-45 (5th Cir. 2006), *cert. denied*, 549 U.S. 1283 (2007).

App. B at 45-46. The district court ultimately concluded that "[n]one of the exceptions to the procedural default doctrine apply to [the *Wiggins* claim]." *Id.* at 55.

The United States Court of Appeals for the Fifth Circuit concurred with the district court's conclusion that Mr. Trevino's *Wiggins* claim was procedurally barred under Texas' abuse-of-the-writ doctrine. *Trevino v. Thaler*, No. 10-70004, (5th Cir. November 14, 2011), included at Appendix A. The court then examined the question of whether Mr. Trevino could satisfy the "miscarriage of justice" exception to that procedural bar in accordance with the district court's grant of a certificate of appealability. Following an analysis similar to that of the district court, the court of appeals concluded that this exception did not apply to Mr. Trevino's claim because he could not satisfy the actual-innocence standard with regard to his eligibility for the death penalty. However, in so doing, the court noted that:

... the volume of new evidence identified by Trevino is much greater than what was presented by his trial attorneys. Notwithstanding the volume of this potentially mitigating evidence or the effect it might have on the jury's sympathies, this evidence does not satisfy the demanding standard of "actual innocence" because it bears no relationship to Trevino's eligibility for the death penalty.

See Appendix A at 23.

In a 2-1 decision---with a strong dissent by Judge Dennis---the court of appeals also

affirmed the district court's denial of Mr. Trevino's *Brady* and associated ineffective assistance claims. Significantly, the court indicated that "[t]he record evidence indicates that [the allegedly withheld] statement was the second of three signed, written statements Rey gave to police [] during the investigation of Salinas' death."<sup>2</sup> However, that referenced "third statement" was and never had been, part of Mr. Trevino's record. The fifth circuit explained that the statement had been obtained and considered by the court—without notice to Mr. Trevino or his counsel—in the court's own *sua sponte* investigation. Appendix A, at fn3, p9.

In conducting its review of the claims related to Sam Rey's exculpatory statement, the court of appeals noted that it conducted an independent investigation into Rey's statement and found a third statement by him. The court then identified and quoted the third statement—which was not in Mr. Trevino's record at trial, on appeal, or on any habeas proceeding at any level. This statement was not identified, raised, or addressed by either party to Mr. Trevino's proceedings, or by any court reviewing any proceedings at any level prior to the Fifth Circuit's review. The court of appeals then took judicial notice of not only the existence of that document, but of its contents and credibility specifically in comparison to, and in contrast with, the document at the core of Mr. Trevino's *Brady* and associated ineffective assistance claims, Rey's second statement.

The court of appeals made Sam Rey's judicially-noticed third statement the

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<sup>2</sup> Appendix A, at 6 (emphasis in original).



centerpiece of its analysis of Mr. Trevino's *Brady* and associated ineffective assistance of counsel claims. The panel majority explained:

In light of Rey's third written statement to the police inculcating Trevino in Salinas's murder, it is indisputable that Rey's second written statement was immaterial to Trevino's case. If Trevino's lawyers had been successful in introducing Rey's second statement to suggest that Cervantes was solely responsible for Salinas's murder, the prosecution undoubtedly would have introduced Rey's third statement. Introduction of Rey's third statement would have destroyed any benefit Trevino would have otherwise gained from the second statement. Not only does Rey's third statement expressly retract his second statement's assertion that Cervantes took Salinas to the woods by himself, Rey's third statement plainly describes Trevino's active participation in Salinas's rape and murder....

Under these circumstances, Rey's second written statement cannot be considered material because there is not a "reasonable probability" that the outcome of Trevino's trial would have been different if the full statement had been disclosed. In fact, quite the opposite is true—it is almost certain that the outcome would have been the same.

Appendix A, at 14-16.

The panel majority did note that Rule of Evidence 201 controlling a court's taking of judicial notice does provide an opportunity for the parties to a litigation to comment on such action. The court addressed that issue with the following entry in a footnote in its opinion:

... Because Trevino has not had an opportunity to have input into our decision to take judicial notice of documents in the state court proceedings involving Rey, we afford him the right to raise any objection he may have by means of a petition for rehearing, which objection we will consider filed before our opinion issued.

Appendix A, fn3, p 9.<sup>3</sup>

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<sup>3</sup>Mr. Trevino did file petitions for both rehearing and rehearing en banc. Both were denied. Appendix E.

Judge Dennis dissented from this ruling, summarizing his views as follows:

Sam Rey, an accomplice to the rape and murder of Linda Salinas on June 9, 1996, gave a detailed, sworn, written statement to police on June 12, 1996, which completely exculpated Carlos Trevino. This statement by Rey contradicted the testimony of Juan Gonzales, the state's chief prosecution witness, who said that Trevino participated in the rape and shortly after the crime, Trevino made statements to Rey, Gonzales, and others inculcating himself in Salinas' murder. In his federal habeas petition, Trevino contends that the state failed to disclose Rey's June 12th written statement in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and that if the statement had been disclosed and available, his attorneys failed to discover and use it, rendering their assistance ineffective in violation of *Strickland v. Washington*, 466 U.S. 668 (1984). The majority concludes that Trevino is not entitled to habeas relief because Rey's June 12th statement is not "material" under *Brady* and *Strickland*. The majority reasons that Rey's statement is not material because the prosecutor in Trevino's trial would have used a subsequent, June 13th, written statement by Rey, which inculpated Trevino, to contradict Rey's earlier June 12th statement. However, that later statement does not appear anywhere in the record before the district court in this case; indeed, the majority has produced it *sua sponte* by going outside of the record in this case, to a record of another state court case to which Trevino was not a party. Neither the state nor Trevino had ever before mentioned Rey's June 13th statement, let alone litigated the significance of it—for all we know, neither Trevino nor the state's attorneys in Trevino's criminal trial, nor the state's attorneys in Trevino's habeas proceedings, has ever seen or heard of this statement before the majority *sua sponte* obtained a copy of it after this appeal was fully briefed.

I respectfully disagree with the majority's course in taking judicial notice of Rey's June 13th written statement and using it to resolve this case on its merits. The majority provides no authority that permits us, without request or agreement of the parties, to go outside of the record before the district court, to a state court record of a different case, of a different defendant, to find a statement by a non-party witness who did not testify at the petitioner's trial. Moreover, the majority makes a determination that Rey's June 13th statement is more truthful than his June 12th statement, and therefore is a retraction of it; however, such a credibility determination is not a kind of fact that may be judicially noticed, *viz.*, a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose



accuracy cannot reasonably be questioned.” Fed.R.Evid. 201(b). Rather than using judicial notice to improperly supersede Rey’s June 12th statement with his June 13th statement that was not part of the district court’s record, we should vacate the district court’s judgment and remand the case for an evidentiary hearing or stipulations of the parties as to the context and circumstances surrounding Rey’s June 12th and 13th statements and for decisions upon the issues arising out of them. I do not share the majority’s confidence in their ability as appellate judges with nothing but a paper record to neatly reconstruct the likely outcome of this case had all of Rey’s statements been disclosed to defense counsel before trial, since Rey’s third statement, upon which the majority so heavily relies in affirming the death penalty, has never been introduced or subjected to any trial court adversary proceedings in this case.

Appendix A, at 27-28.

#### **REASONS FOR GRANTING THE WRIT**

**A. THE COURT SHOULD GRANT CERTIORARI TO ALLOW THE LOWER COURTS TO REVIEW THE FINDING OF PROCEDURAL DEFAULT OF PETITIONER’S *WIGGINS* CLAIM IN LIGHT OF ITS RECENT DECISION IN *MARTINEZ v. RYAN***

In *Martinez v. Ryan*, 566 U.S. \_\_\_, 132 S.Ct. 1309 (2012), this Court recognized a narrow exception to the holding in *Coleman v. Thompson*, 501 U.S. 772 (1991) such that inadequate assistance of counsel at initial-review collateral proceedings may establish cause to excuse a prisoner’s procedural default of a claim of ineffective assistance of counsel at trial. This is not a constitutional right, but an exception in equity applicable in situations in which a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding. Even then, it is available only where the State did not appoint counsel in the initial-review collateral proceedings, or where appointed counsel in such a proceeding in which such a claim should have been raised, was ineffective under the

standards of *Strickland v. Washington*, 466 U.S. 668 (1984). Still, to overcome the default, the prisoner must establish that the claim has some merit.

1. IN PRACTICE, CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN A TEXAS CAPITAL CASE CAN ONLY EFFECTIVELY BE RAISED ON INITIAL-COLLATERAL REVIEW

The Texas Court of Criminal Appeals effectively and consistently defers consideration of the vast majority of ineffective assistance of trial counsel claims to initial state habeas proceedings, because virtually every such claim relies upon facts outside the trial record. *See Ex parte White*, 160 S.W.3d 46, 49 n.1 (Tex. Crim. App. 2004); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Ex parte Torres*, 943 S.W.2d 469, 475-76 (Tex. Crim. App. 1997); *Ex parte Duffey*, 607 S.W.2d 507, 513 (Tex. Crim. App. 1980), overruled on other grounds by *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999). *See also, Ex parte Brown*, 158 S.W.3d. 449, 460-61 (Tex. Crim. App. 2005) (Keasler, J., dissenting) (explaining that ineffective assistance of counsel claims as an entire class may not be raised until habeas corpus); *Boone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002) (dissuading the assertion of ineffective assistance of counsel claims on direct appeal).

While the facts giving rise to ineffective assistance of trial counsel claims might in theory be raised in the motion for new trial, the practical impossibility of such an effort precludes this as an alternative to habeas proceedings. New counsel would have to be appointed immediately at the conclusion of trial, and new counsel would have to obtain the required resources and conduct the intensive investigation required to examine guilt-

innocence and penalty phase facts underlying aggravation and mitigation. In addition, Rule 21.4 of the Texas Rules of Appellate Procedure require that the trial judge rule on a Motion for New Trial within 75-days of imposing sentence, else it is deemed denied by operation of law. In practical terms, that time is woefully insufficient for conducting a proper independent investigation and analysis, and developing an adequate record in a capital, death penalty, trial. Thus a person convicted of a capital offense in Texas is required, in practice, to raise any ineffective-assistance-of-trial-counsel claims on initial state habeas.

2. MR. TREVINO'S CLAIM THAT HIS TRIAL COUNSEL FAILED TO INVESTIGATE, DEVELOP AND PRESENT MITIGATION EVIDENCE HAS MERIT

Upon appointment to replace initial federal habeas counsel, who was also the initial state habeas counsel, new federal habeas counsel initiated a due diligence review of prior proceedings. He discovered that while trial counsel had made preparations for the guilt-innocence phase of trial, there had been almost no investigation into trial counsel's efforts to develop factual or mitigation issues pertinent to the punishment phase. He further discovered that state habeas counsel (continued on appointment as first federal habeas counsel) had also failed to perform an independent investigation into potential punishment or mitigation-related issues. Thus state habeas counsel entirely failed to investigate any non-record issue of effective assistance of trial counsel at the punishment phase of the trial. Accordingly, no effective assistance of counsel issues pertaining to the investigation, development or presentation of mitigation evidence at the punishment phase of the trial were

either examined or raised on initial collateral review.

The paucity of mitigation evidence presented by trial counsel is chronicled in the federal district court's review of the trial proceedings. That court noted that, at the punishment phase of trial:

The defense presented a single witness, petitioner's aunt, who testified (1) she had known petitioner all his life, (2) petitioner's father was largely absent throughout petitioner's life, (3) petitioner's mother "has alcohol problems right now," (4) Petitioner's family was on welfare during his childhood, (5) petitioner was a loner in school, (6) petitioner dropped out of school and went to work for his mother's boyfriend doing roofing work, (7) petitioner is the father of one child and is good with children, often taking care of her two daughters, and (8) she knows petitioner is incapable of committing capital murder.

Appendix B at 8-9.

Second federal counsel's investigation, however, revealed that, at a minimum, the following information could have been developed and presented by trial counsel at the punishment phase of Mr. Trevino's capital trial:

1. Mr. Trevino's mother was emotionally unstable, physically abusive, alcoholic who abused alcohol throughout her pregnancy with Mr. Trevino.
2. Mr. Trevino was born premature.
3. Mr. Trevino weighed only four pounds at birth and required considerable hospital care during his first few weeks of life.
4. For the rest of his life, Mr. Trevino suffered the deleterious effects of Fetal Alcohol Syndrome, as well as his mother's physical and emotional abuse.
5. Mr. Trevino was without his biological father throughout his childhood.

6. Mr. Trevino was malnourished as a child.
7. Mr. Trevino suffered numerous serious head injuries as a child for which he received little or no medical care due to the neglect of his mother and the absence of his father.
8. Mr. Trevino was physically abused by his mother and her "boy friends" as a child.
9. Mr. Trevino was traumatized as a child by experiencing the death of his younger sister.
10. Mr. Trevino was traumatized as a child by witnessing his friend being shot to death.
11. Mr. Trevino's family wound up homeless.
12. Mr. Trevino was a talented artist.
13. Mr. Trevino is a father of a son, Carlos, Jr.
14. Mr. Trevino worked as a roofer with his stepfather.
15. Mr. Trevino helped raise the son of his girlfriend as if he was his own.
16. Mr. Trevino was exposed to alcohol and drug abuse from an early age and began abusing both alcohol and marijuana himself before he reached age twelve.
17. Mr. Trevino became involved in street gangs and street crime by age twelve.
18. Mr. Trevino's history of crime was nonviolence.
19. Mr. Trevino, if sentenced to capital life would not be eligible for parole until he turned 58 years old.
20. Mr. Trevino experienced a lifetime of adversity, disadvantage, and disability.

21. Mr. Trevino's first parole date would cause him to "age out," making him more docile and less likely to re-offend upon his first parole eligibility.

In a capital trial, these factors are certainly meritorious. Any subset of them could have given one or more jurors reason to vote for life. Because his trial counsel never investigated or developed this information, Mr. Trevino's jury was never told of this evidence, and initial state habeas counsel never even attempted to discover the mitigation factors listed above.

Mr. Trevino believes it significant that in reviewing this claim, the federal district court found that, under Texas law, the new mitigating evidence Mr. Trevino presented focused almost entirely on the "mitigation" or *post-Perry* special issue submitted to the jury at the punishment phase of his capital murder trial, and not on his "eligibility" for the death sentence. While the district court denied this claim, it did not totally disregard the potential impact of the new mitigating evidence. In granting a certificate of appealability on the question, the court noted that this evidence was so substantial that it could reasonably be considered as rendering Mr. Trevino ineligible for the death penalty:

Under these circumstances, reasonable minds could disagree over whether petitioner has satisfied the fundamental miscarriage of justice exception to the procedural default doctrine with regard to his *Wiggins* claim.

Appendix B, at 115.

3. IF GIVEN THE OPPORTUNITY TO DEMONSTRATE THAT HIS STATE HABEAS COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO DEVELOP AND ASSERT HIS *WIGGINS* CLAIM, MR. TREVINO WILL BE ABLE TO DEMONSTRATE CAUSE FOR THE DEFAULT OF THIS CLAIM IN STATE HABEAS PROCEEDINGS



When Mr. Trevino's case was decided by the federal district court, counsel for Mr. Trevino had no reasonable basis to believe that this Court would, a little more than two years thereafter, modify its decision in *Coleman v. Thompson* to permit federal habeas petitioners to demonstrate ineffective assistance of state habeas counsel as cause for the failure to raise ineffective assistance of trial counsel claims in state habeas proceedings. By the time he filed Mr. Trevino's reply brief in the Fifth Circuit, however—on October 18, 2010—this Court had given the first indication that it might be preparing to re-examine this question by staying the execution of another Texas prisoner who presented the very “cause” question that would later be decided in *Martinez v. Ryan*. See *Bradford v. Thaler*, No. 09-11519 (October 8, 2010) (staying execution pending the disposition of petition for writ of certiorari).<sup>4</sup> Mr. Trevino brought this matter to the attention of the Fifth Circuit, reminded the court that his state habeas counsel had undertaken no investigation of non-record-based ineffective assistance of trial counsel claims, and asked that the court stay further proceedings on his appeal so that he could take advantage of any ultimately favorable decision on this issue. See *Trevino v. Thaler*, No. 10-70004, Reply Brief of the Appellant, at 12-13, 18. The Fifth Circuit, however, denied his appeal one month later.

In the wake of *Martinez v. Ryan*, Mr. Trevino should have the opportunity to demonstrate that state habeas counsel was ineffective in failing to develop and present the

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<sup>4</sup>The Question Presented in *Bradford v. Thaler* was: “Whether the ineffective assistance of counsel in post-conviction proceedings constitutes ‘cause,’ when, as a matter of state law, post-conviction proceedings provide the only state forum in which a death-sentenced inmate can present the federal constitutional claim that his trial lawyer was incompetent.”

substantial *Wiggins* claim that he was able to present later in federal habeas proceedings. He already demonstrated a *prima facie* case of habeas counsel's ineffectiveness in attempting to persuade the Texas Court of Criminal Appeals to allow his *Wiggins* claim to be heard when he pled the following:

On July 31, 2002, former state habeas counsel, Albert L. Rodriguez, filed in federal district court a motion to withdraw from further representation of Petitioner Trevino in the federal habeas proceedings. Mr. Rodriguez succinctly stated the reasons for his decision to withdraw:

Over the last few years counsel has become progressively ill from a thyroid condition, diabetes, hypertension, and mental stress and depression from all of the above. Counsel is taking the following daily medications: Synthroid, Cartia, Glucophage, and Zoloft. Dr. Jose Sanchez has strongly urged that counsel discontinue death penalty writ cases as they greatly aggravate his existing medical condition.

See Motion to Withdraw as Attorney for Petitioner, p. 2. The federal district court granted the motion to withdraw on August 14, 2002.

Mr. Rodriguez refused to discuss his medical and psychological problems with undersigned counsel. However, it is clear from Mr. Rodriguez's own description of his conditions and daily prescription medications that his medical and psychological conditions were long-standing, growing progressively worse, and taking a serious toll on his day-to-day functioning. It is also clear that practicing death penalty law was exacerbating all of his health problems. His physician "**strongly urged**" him to stop representing death row inmates



in post-conviction proceedings, because such cases “**greatly aggravate his existing medical condition.**” *Id.* at 2 (emphases added).

A death row inmate represented by an attorney who is suffering from a progressively worsening medical condition that is causing major depressive disorder and other mental stress and which is “greatly aggravated” by his continued representation of death row inmates in post-conviction proceedings has been deprived in some fundamental way of competent, effective assistance of counsel. By definition, a major depressive episode usually interferes with a person’s daily functioning and can include increased fatigue, loss of interest in normal activities, and slowed thinking or impaired concentration. Hypothyroidism can cause depression, fatigue, and decreased concentration. The claims that Mr. Rodriguez did raise in the initial state habeas application provide compelling evidence of the extent to which his medical and psychological problems substantially impaired his abilities as Petitioner Trevino’s appointed post-conviction counsel.

Twenty-nine of the claims contained in the initial state habeas application are lifted nearly verbatim from the direct appeal brief. The remaining claims consist of various allegations of ineffective assistance of counsel for failure to make specific objections at trial. ***Not one of the 46 separately pleaded claims contained in the initial state habeas application relies on facts outside of the trial record.*** Clearly, Mr. Rodriguez attempted to minimize the toll that a comprehensive investigation and litigation of extra-record claims would take on his physical and mental health. Unfortunately, because Mr. Rodriguez’s

medical condition affected his abilities to act as habeas counsel, he should have notified the Texas Court of Criminal Appeals of his compromised condition at the time of his appointment.

The wealth of readily-available and compelling mitigating evidence demonstrates the effect Mr. Rodriguez's physical and mental problems had on his performance. Current habeas counsel developed a cognizable and meritorious claim of ineffective assistance of counsel at the punishment phase. The trial record alone would have placed a physically and mentally healthy attorney on notice that an investigation into Petitioner Trevino's background would be absolutely essential, because trial counsel put on only a single witness at the sentencing stage, whose testimony fills a mere five pages of transcript. *See* Testimony of Juanita Treviño DeLeon, RR Vol. XXIII, pp. 135-40.

For all the reasons set out herein, Mr. Trevino urges this Court to grant certiorari and remanding his case so the Fifth Circuit Court of Appeals can examine his claims of ineffectiveness of state habeas and trial counsel in light of *Martinez v Ryan*, as the Court has done in similarly-situated cases.<sup>5</sup>

**B. THE FIFTH CIRCUIT ERRED IN USING AN EXTRAORDINARY AND FLAWED JUDICIAL PROCESS TO DENY PETITIONER'S *BRADY* AND ASSOCIATED INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS**

**1. THE COURT OF APPEALS' *SUA SPONTE* INVESTIGATION AND SUPPLEMENTATION OF THE RECORD BEFORE IT WAS WITHOUT PRECEDENT**

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<sup>5</sup> 10-8629, *Smith v. Colson*; 10-11031, *Cantu v. Thaler*; 11-5067, *Middlebrooks v. Thaler*; 11-6969, *Newbury v. Thaler*; 11-7978, *Woods v. Holbrook*

The *Brady* and associated ineffective assistance of counsel issues appealed to the Fifth Circuit involved an allegedly undisclosed/undiscovered exculpatory statement by a non-testifying co-defendant - the second statement of Seanido Rey. In the process of addressing those issues, the court of appeals conducted an independent investigation in which it *sua sponte* obtained a third statement of Mr. Rey from his plea proceedings, conducted nearly a year after Mr. Trevino's trial, in the District Court of Bexar County, Texas. A sharply divided panel of the court then proceeded to supplement Mr. Trevino's record on appeal by taking judicial notice of that document. In a 2-1 opinion, the court sharply divided over the question of whether it could take such action.

There is no question that an appellate court may take judicial notice of adjudicative facts pursuant to Rule of Evidence 201. However, there are qualifications to that action. The Rule requires that the fact judicially noticed not be subject to reasonable dispute because it is either generally known within the trial court's territorial jurisdiction, or can be accurately and readily determined from sources whose accuracy cannot be reasonably be questioned.

Judge Dennis' dissent sharply criticized the majority's action. Appendix A at 27-48

(Dennis, J.) It noted that:

After this appeal was fully briefed, the majority, *sua sponte*, requested the state court record for Rey's murder conviction. That record contains three written statements by Rey, the second of which forms the basis of Trevino's claims in this case, and is the only written statement by Rey that was introduced into the habeas record before the district court. The other two statements do not appear in the district court record in this case and have never been addressed or litigated by the parties. Nonetheless, the majority now reasons that it can take

judicial notice of Rey's third (June 13th) statement, and give credit to it in lieu of Rey's second (June 12th) statement. In my view, that course is not supported by precedent or authority.

*Id.* at 34. To be sure, the panel majority did cite several cases in support of its action. Appendix A at 9, n.3. However, as Judge Dennis' dissent explained, those cases do not provide precedent or authority for the panel majority's action.

The first cite by the majority is to *Brown v. Lippard*, 350 F. App'x 879, 883 n.2 (5th Cir 2009, unpublished). This case involved taking judicial notice of the transcript of the first of two trials on the same cause of action brought by Brown---as Judge Dennis' dissent noted, the *Brown* court took judicial notice "merely of a 'docket entry establishing the existence of the 2001 transcript.'" Appendix A at 38. In analyzing whether it could take judicial notice of the contents, and not just the existence of that document, the *Brown* court examined two authorities, *Lumen Constr., Inc. v. Brant Constr. Co.*, 780 F.2d 691, 697 n.4 (7th Cir. 1985) and *Jacques v. U.S. R.R. Ret. Bd.*, 736 F.2d 34, 39-40 (2d Cir. 1984). The *Lumen Construction* case addressed proceedings below involving the same litigants and the same questions. In *Jacques*, the document in question was from a proceeding involving the same appellant, was known to the parties, had been the topic of discussion at oral argument, and the contents of the document were not subject to dispute. After examining those cases, the *Brown* court made no decision regarding the propriety of taking judicial notice of documents not in any prior proceeding involving the appellant, and instead "assumed *arguendo*" that it could do so in that specific case. *Brown v. Lippard*, 350 F. App'x at 883 n.2. Thus, it

established no precedent for the panel majority's action.

The second authority cited by the majority was *Moore v. Estelle*, 526 F.2d 690, 694 (5th Cir. 1976). Appendix A at 9, n.3. The *Moore* court noted that "we take judicial notice of prior habeas proceedings brought by this appellant *in connection with the same conviction.*" *Moore*, 526 F.2d at 694 (internal citations omitted, emphasis added). Clearly, the state trial court case file for Seanido Rey did not involve Mr. Trevino's conviction, nor was it brought, or contested for that matter, by Mr. Trevino. None of the cases cited or referenced provide precedent or authority for the panel majority's action.

2. THE COURT OF APPEALS' COMPOUNDED ITS ERROR BY TAKING, AND RELYING UPON, JUDICIAL NOTICE OF THE RELATIVE CREDIBILITY OF TWO DOCUMENTS IN DETERMINING THE MATERIALITY ISSUE

Not only did the court of appeals err in its *sua sponte* supplementation of the record, it compounded that error by taking judicial notice that Mr. Rey's newly acquired third statement was more credible than his second. As noted above, Rule of Evidence 201 only permits a court to take such notice of adjudicative facts that are "not subject to reasonable dispute" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. Mr. Rey's second and third statements were, in many respects, in conflict with each other. There was no "source whose accuracy cannot reasonably be questioned" to which the court of appeals, or anyone else for that matter, could turn to determine the accuracy of the third statement, or of either statement. Because the statements are in partial conflict, and since none of the parties to Mr. Trevino's

proceedings had ever litigated, or even addressed, Rey's third statement, it was certainly subject to reasonable dispute. In fact, the credibility of Rey's second statement had not been litigated. Only its disclosure or discovery had been the subject of litigation.

At this point, the panel majority should have decided to remand Mr. Trevino's case to the district court for further consideration, for an appellate court can only speculate what a jury would have found as to the relative credibility of these two statements. *See Smith v. Cain*, 132 S.Ct. 627, 630 (2012) ("[t]hat merely leaves us to speculate about which of [the prosecution witness'] contradictory declarations the jury would have believed"). However, the panel majority proceeded undeterred by speculation.

The majority went on to examine the usefulness of the two statements at trial and found that the third statement would be found more credible had both statements been available. Thus, the majority concluded that:

Rey's third written statement is consistent with the trial evidence. There is no reasonable probability that but for the alleged failure of the prosecution to disclose Rey's second written statement, the jury would have found Trevino not guilty of capital murder under Texas's law of the parties

Appendix A at 16. While engaged in such speculation, the majority discounted the affidavits of defense counsel asserting that neither had seen Rey's second statement, and overlooked the state's admission, as addressed in the dissent, that it may not have disclosed that statement. Appendix A at 46-47. Having discounted those affidavits, it chose as well to discount their statements of how the second statement would have been used if disclosed.



It completely ignored the usefulness of both statements in pretrial investigation and preparation. It ignored their usefulness by defense counsel in cross examination of state witnesses or challenging their credibility at both the guilt-innocence and punishment phases of trial.<sup>6</sup>

The majority thus concluded that because Rey's third, (speculatively) more credible, statement inculpated Trevino in the murder, "it is indisputable that Rey's second written statement was immaterial to Trevino's case." Appendix A at 14.

As the dissent succinctly pointed out,:

It is clear that on the record before the district court, Rey's second statement is material—otherwise, the majority would not have found it necessary to commit serious legal error by *sua sponte* going outside of the district court's record to take notice of facts not judicially noticeable under Federal Rule of Evidence 201 in order to reach the contrary conclusion

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<sup>6</sup> As Mr. Trevino stated in his brief to the federal district court,

[Mr. Trevino] contends that had Seanido Rey's statement been disclosed, the defense team would have been better able to counter the State's "lone killer" theory, especially at the punishment phase of trial. It would have better prepared the defense to cross examine other state witnesses. Placing the information contained in Rey's statement in context with the time-line of information in other statements in other statements attributed to co-defendants, a skilled trial attorney could have placed some question in the minds of the jurors at punishment regarding Mr. Trevino's moral culpability in Ms. Salinas' death.

*See Trevino v. Thaler*, No. 10-70004, Brief of the Appellant, at 10.

Appendix A at 40. The dissent then concisely summarized the errors of the panel majority

as:

The majority's taking judicial notice of Rey's third written statement in order to conclude that it retracts and makes immaterial Rey's second statement, is not authorized by law; it judicially notices a kind of adjudicative fact that courts may not take notice of under Federal Rule of Evidence 201. The majority's contention is that the prosecutors would have used Rey's third statement to undermine any beneficial use defense counsel could have made of Rey's second written statement, and thus, that the second statement is immaterial. To reach this conclusion requires the majority to take notice of the following facts: that Rey made a third written statement; that he made it before Trevino's trial; that the prosecutors in Trevino's case were aware of the existence of that written statement at the time of Trevino's trial; that the prosecutors in Trevino's trial would have used that statement if defense counsel had called Rey as a witness or used his second written statement to attack the state's case; and that the jury would have given credit to Rey's third written statement in lieu of his second written statement.

However, these facts are "subject to reasonable dispute" and are not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Therefore, they are not the "kinds of facts" of which Rule 201 allows a court to take judicial notice. Based on the record before the district court, supplemented by the record from Rey's state court criminal proceeding, we cannot properly know or judicially notice whether the state's attorneys in Trevino's criminal trial were aware of Rey's third statement. (The prosecutor in Rey's case was not the same as in Trevino's case.) It is not at all certain that the state's attorneys would have known of or resorted to using Rey's third statement at trial, because they did not use it or even mention it in Trevino's federal habeas proceedings. Moreover, the majority's argument rests on an improper determination of the relative truthfulness of one statement by Rey vis-à-vis another by him. However, the truth of a statement is not a proper matter for judicial notice. See Wright & Graham, *supra*, § 5106.4, at 231-36 ("It seems clear that a court cannot notice pleadings or testimony [in court records] as true simply because these statements are filed with the court. . . [A] court cannot take judicial notice of the truth of a document simply because someone put it in the court's files . . . [Courts] can notice [that an] assertion was made, but not that it was true . . .").



The court of appeals violated both precedent and established rules in its analysis and determination of Mr. Trevino's *Brady* and associated ineffective assistance of counsel claims. It has so significantly departed from the accepted and usual course of judicial proceedings as to call on this Court to exercise its supervisory powers, grant this petition for certiorari, and remand to the Fifth Circuit for further review in accordance with established precedent and rules.

### **CONCLUSION AND PRAYER FOR RELIEF**

For the foregoing reasons, Carlos Trevino respectfully requests this Court grant the petition for writ of certiorari, and accept this case for review. Alternatively, Mr. Trevino requests that his petition be granted, his sentence be vacated, and his case remanded.

Respectfully submitted,

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# **OPPOSITION BRIEF**

**No. 11-10189**

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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**CARLOS TREVINO,**  
Petitioner,

v.

**RICK THALER, Director,**  
Texas Department of Criminal Justice,  
Correctional Institutions Division,  
Respondent.

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On Petition for Writ of Certiorari to the  
Fifth Circuit Court of Appeals

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**RESPONDENT'S BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Trevino procedurally defaulted his claim that trial counsel was constitutionally ineffective for failing to investigate and present mitigating evidence when he failed to raise it in his initial state habeas corpus application. The federal district court determined that Trevino had shown neither cause and prejudice nor a fundamental miscarriage of justice that might excuse the default. In the alternative, the district court concluded that Trevino had not established deficient performance and resultant prejudice under *Strickland*. That court then granted a certificate of appealability (COA) on the issue of whether Trevino had shown a fundamental miscarriage of justice. The circuit court found that he had not and did not pass on the issue of whether he had—or could have—established cause and prejudice. Now, Trevino seeks to take advantage of the Court's recent ruling in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), thus raising the following question:

Should Trevino be allowed to allege ineffective assistance of state habeas counsel to overcome a procedurally defaulted claim that is without merit or not "substantial" in contravention of *Martinez*?

2. After the Court of Criminal Appeals dismissed Trevino's claim of ineffective assistance of counsel as an abuse of the writ, Trevino again returned to state court to raise a *Brady* claim, as to both guilt/innocence and punishment, based on the discovery of a second statement by one of his co-defendants (Siendo "Sam" Rey) implicating a third co-defendant (Santos Cervantes) as Linda's actual killer. However, instead of filing an application for state writ of habeas corpus in accordance with state law (and as he did previously in connection with his ineffective-assistance-of-counsel claim) this time, Trevino filed only a motion for appointment of counsel in the state trial court. Because state law does not allow for the appointment of counsel unless and until the Court of Criminal Appeals has determined that specific exceptions are met, the lower state court did not act on the motion. And rather than taking corrective action in order to meet state law requirements, Trevino did nothing for two years. The lower courts both erroneously concluded that Trevino should be excused from the exhaustion requirement because the state process had been rendered ineffective to protect his constitutional rights under 28 U.S.C. § 2254(b)(1). Trevino's wanton disregard of well-established state rules raises the following question:

Should Trevino be permitted to bypass the state courts and raise a federal constitutional claim for the first time when he deliberately chose to disregard the state's rules for filing a second or successive state habeas application?

3. Trevino and four friends brutally sexually assaulted and killed fifteen-year-old Linda Salinas. Trevino has never denied taking part in the actions that night. Indeed, the record establishes that he not only actively participated in her sexual assault—by holding her down while the others raped her—he was at the very least, complicit in her murder. Over sixteen years later, Trevino seeks to have his conviction and sentence overturned relying on the alleged newly discovered statement of one co-defendant (Rey) naming a third co-defendant (Cervantes) as Linda's actual killer. Having taken judicial notice of a third statement by Rey, the circuit court concluded, first, that suppression of the second statement had not been established because defense counsel were—at the least—on notice of its existence, and second, that the statement was not material because Trevino had been charged as a party in Linda's brutal and senseless murder; thus, the jurors did not have to believe, beyond a reasonable doubt, that he was the actual killer. They only had to believe that he was complicit in the actions of a third party. This gives rise to the following question:

Where the petitioner has never denied taking part in the offense that led to his conviction and death sentence, can he establish materiality for purposes of *Brady* when the record establishes beyond a reasonable doubt that he was an active participant in the underlying sexual assault and at least complicit in the murder?

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Carlos Trevino<sup>1</sup> was convicted of capital murder and sentenced to death for his role in the vicious gang rape and brutal murder of fifteen-year-old Linda Salinas in San Antonio in 1996. In the courts below, he unsuccessfully challenged his presumptively valid conviction and death sentence pursuant to 28 U.S.C. § 2254. Trevino now seeks to reverse the Fifth Circuit's judgment, arguing that *Martinez v. Ryan* allows him to excuse the procedural default of his ineffective-assistance-of-trial-counsel claim and that the lower court erred in ultimately finding his *Brady* claim to be without merit. As discussed below, this Court should deny certiorari review.

### STATEMENT OF THE CASE

#### I. Statement of Facts

##### A. Facts of the crime

On the evening of June 9, 1996, Linda Salinas left her house around 8:45 or 9:00 p.m. to go use the phone at her cousin's house; she was calling her best friend, Stephanie Saldivar. 18 RR 50, 57.<sup>2</sup> After talking to Linda, Stephanie and her brother, Steve, drove to a nearby Whataburger to pick

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<sup>1</sup> Respondent Rick Thaler will be referred to as "the Director."

<sup>2</sup> "RR" refers to the Reporter's Record (Statement of Facts) of transcribed trial proceedings, preceded by volume number and followed by page number(s).

Linda up. When Linda never arrived, the two went home and waited up until 1:00 a.m. At that time—with still no sign of Linda—the two went to bed, leaving the front door unlocked for Linda. *Id.* at 84-85.

That same evening, Trevino, Juan Gonzales<sup>3</sup> (Trevino's cousin), Siendo "Sam" Rey, Santos Cervantes, and Brian Apolinar<sup>4</sup> attended a party at the home of Jay Mata. 16 RR 150-51; 18 RR 164-74. Having drunk all the beer, Trevino, Gonzales, Rey, Cervantes, and Apolinar drove to a nearby convenience store to get more. 18 RR 173-75. As he departed the store, Gonzales noticed Cervantes talking to Linda, who had been using a pay phone outside the store. *Id.* at 176. Apolinar, the group's driver, agreed to take Linda to a nearby Whataburger to meet Stephanie. *Id.* at 177.

But instead of taking Linda to Whataburger, Apolinar drove the group to Espada Park. *Id.* at 180. Cervantes took Linda into the woods and was soon followed by Apolinar, Gonzales, Rey, and Trevino. *Id.* at 181-82. Cervantes then mounted her and raped her while Apolinar restrained her, despite her struggle to escape. *Id.* at 182-83. Rey then sexually assaulted Linda while Apolinar continued to hold her hands. *Id.* at 183. When

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<sup>3</sup> Gonzales was the State's key witness and the only one of the five not charged in relation to Linda's rape and murder.

<sup>4</sup> Rey was sentenced to fifty years after pleading guilty to murder. Cervantes was sentenced to life in prison after pleading guilty to capital murder. Apolinar was sentenced to twenty-five years, having been found guilty of aggravated sexual assault.

Cervantes threatened to hit her if she did not turn onto her stomach, Linda reluctantly complied. *Id.* at 184. At this point, Trevino told Gonzales he should participate in the assault, but Gonzales refused and returned to the car to act as a lookout. *Id.* at 185. He later returned to find Cervantes engaged in forcible anal intercourse with Linda. Apolinar and Rey alternately forced their penises into Linda's mouth, and Rey restrained Linda during those times when he was not forcing her to perform oral sex on him. *Id.* at 185-86. Trevino also participated in restraining her. *Id.* at 194-95. According to Gonzales, Rey told Cervantes that "we don't need no witnesses," and Cervantes repeated the statement to Trevino, who responded, "[W]e'll do what we have to do." *Id.* at 190-91. Gonzales returned to the car again, and approximately five minutes later, so did the others. *Id.* at 192.

The evidence at trial showed that Linda had been stabbed in the neck with a knife, partially severing her carotid artery; she bled to death as a result. 19 RR 63-68. The shirts that Trevino and Cervantes wore were stained with Linda's blood. 18 RR 192; 19 RR 4. As they left the area, with Linda's backpack still in the car, Cervantes told Trevino that Trevino's snapping of Linda's neck was "cool," to which Trevino replied that he had "learned how to kill." 19 RR 4-5; 23 RR 84. The five men returned to Mata's house, after the group had, in Gonzales's words, "raped and killed the girl."

19 RR 7. Trevino and Cervantes then burned Linda's backpack in Mata's backyard. 16 RR 204-06.

A forensics expert testified that she compared several items taken from Linda and Trevino. 17 RR 139. She determined that fibers found on a pair of white panties found at the crime scene were consistent with pants belonging to Trevino. *Id.* at 142-43. She also determined that polyester fibers taken from Linda's shorts were consistent with fibers from Trevino's pants. *Id.* at 145-46. She further concluded that the pants used in the comparison could have been the same pants worn by Trevino during the offense. *Id.* at 147-48. In addition, Trevino's fingerprints were found inside Apolinar's car. 18 RR 34. Finally, in examining Linda's underwear, a forensic serologist discovered a mixed blood stain that was sufficient for DNA testing. 19 RR 118, 127. Those tests excluded Rey, Apolinar, Gonzales, and Cervantes as donors of the blood, but they did not exclude Linda and Trevino.<sup>5</sup> *Id.* at 130-32.

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<sup>5</sup> In an order dated December 4, 2008, the federal district court granted Trevino's motion for new DNA testing on this particular blood stain. Docket Entry (DE) 74. The subsequent testing detected nothing—no blood. DE 91-2 at Exhibit 10. In its order denying Trevino's motion to alter or amend the judgment, the court rejected Trevino's argument that the absence of blood alone should be a basis for relief because the possibility that the entire sample had been consumed during the original testing could not be excluded. DE 92 at 10-11.



## B. Facts relating to punishment

### 1. The State's case

In addition to the horrific brutality visited on Linda by Trevino and his friends, the jury heard about his criminal history. Importantly, the jury learned that Trevino had been on parole for only *one month* when the instant crime was committed. 23 RR 113; 1 CR 2.<sup>6</sup>

Trevino's probation officer, Lorraine Reagan, testified that when he was sixteen, Trevino was placed on probation, having been arrested for evading arrest, carrying a weapon and possession of marijuana. 23 RR 20. Reagan said that he "did well on probation. He followed the rules." *Id.* at 24. However, while still on probation, Trevino was again arrested; this time for burglary of a building and burglary of a vehicle. He was allowed to continue on probation, but he was placed in the intensive supervision program. This required that Trevino be seen by his probation officer at least four times a week, and these visits could be during the week, on weekends or at night. *Id.* at 26-27. Trevino also had prior convictions for unlawful possession of a weapon, a Cobray M-11 semi-automatic 9 mm handgun, driving while intoxicated and evading arrest, and unauthorized use of a motor vehicle. *Id.*

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<sup>6</sup> "CR" refers to the Clerk's Record (Transcript) of pleadings and documents filed with the trial court, preceded by volume number and followed by page number(s).

at 67-80; 25 RR 101, 103, 120. For the last conviction, Trevino was sentenced to six years in prison. 25 RR 120.

Bob Morrill, an Intake Interviewer for TDCJ, explained to the jury that Trevino had been confirmed as a member of the La Hermidad y Pistoleros Latinos (HPL) gang. Trevino not only admitted to being a member of the gang, but he also had tattoos indicating membership. On each hip, he had a tattoo of a .45 semi-automatic handgun. On his chest, he had a "PISTOLERO" tattoo. Finally, on his left hand, he had a "16/12" tattoo. Morrill explained that the number sixteen represented the sixteenth letter of the alphabet, "P," and the number twelve represented "H," the twelfth letter of the alphabet. *Id.* at 99-103.

Morrill told the jury that prison gangs such as HPL are typically involved in extortion, drugs, murder and sexual exploitation. He also explained that, as with any gang, members must swear an oath,<sup>7</sup> follow particular rules or be killed, and membership ends *only* with death. *Id.* at 104-06; *see also id.* at 110-12 (HPL's rules and regulations read to the jury).

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<sup>7</sup> The oath was read to the jury: "From today and onward and for the rest of my life, I am a brother. Furthermore, I promise under oath and a decree and punishment of death to be true and firm, to comply by the ruling imposed by the Brotherhood of Pistoleros Latinos, that as of this moment we are brothers. Thanks to our Lord Latino." 23 RR 110.



## 2. The defense's case

The defense started its case by cross-examining Trevino's probation officer. Reagan first told the jury that Trevino had an absentee father. 23 RR 30. She went on to describe the home visits:

The Lena Horne is in the Sutton Homes, I think. I think it's the Sutton Homes. I don't know what you - - how you want me to describe that. During that particular, Mom's on AFDC.<sup>4</sup> I can remember Mom having problems trying to discipline him. I mean, not discipline, really, because Carlos was kind of - - as I can remember, kind of quiet. Didn't give her a lot of problems but yet still there were times when she probably didn't know where he was at some point in time. I think there were two other siblings, I'm not sure, that were younger than Carlos. Because Carlos is the oldest. And I think there were a couple of other siblings in the family. I can't remember anything else.

*Id.* at 31-32 (footnote added). Reagan opined that school was one of Trevino's "biggest problems," explaining that he eventually dropped out. *Id.* at 32. She did not remember if his mother had either a drinking problem or a drug problem. *Id.* at 34-35. Finally, she said that Trevino "associated with some undesirable characters," but he had denied membership in any gang. *Id.* at 35.

Through the cross-examination of Juan Gonzales, the jury learned that Trevino had been "on his own most of his life," but his grandfather helped him some. *Id.* at 85. Gonzales also tried to pin the blame for Linda's murder on Cervantes. *Id.* at 86-89.

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<sup>4</sup> "AFDC" refers to Aid to Families with Dependent Children.

The sole witness for the defense was Trevino's aunt, Juanita DeLeon. She told the jury that Trevino's mother had an alcohol problem and was on welfare. DeLeon said that Trevino "[d]id okay" in school but that he dropped out. *Id.* at 135-37. DeLeon explained that Trevino often took care of her children, telling the jury, "Well, my girls loved him. They were attached to him. When he would go to the store, they would want to go with him." *Id.* at 138. Finally, she said of Trevino that he was "real easy to get along with. I would always tell him my problems. He would always give me advice." *Id.* at 139.

## II. Direct Appeal and Postconviction Proceedings

Having been indicted on charges of capital murder, Trevino was convicted and sentenced to death for the extraordinarily cruel rape and murder of Linda Salinas. 1 CR 5-6, 15; 2 CR 303-04. The Court of Criminal Appeals upheld Trevino's conviction and death sentence. *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999). That same court denied Trevino's first state habeas application based on the trial court's findings of fact and conclusions of law and its own review of the record. *Ex parte Trevino*, No. 48,153-01 (Tex. Crim. App. April 4, 2001) (unpublished order).

Trevino then sought federal habeas relief. *Trevino v. Thaler*, Civil Action No. SA-01-CA-306-XR (W.D. Tex. 2009), DE 10. After requesting and being granted funding, DE 32, Trevino sought and was granted a stay to

return to state court to exhaust a claim that trial counsel was constitutionally ineffective for failing to investigate and present mitigating evidence. DE 36-37. That second application was dismissed as an abuse of the writ. *Ex parte Trevino*, No. 48,153-02 (Tex. Crim. App. Nov. 23, 2005) (citing Tex. Code Crim. Proc. art. 11.071, § 5) (unpublished order).

Trevino once again returned to federal court. DE 42. Soon after filing his petition, DE 76, however, Trevino sought to return to state court again, this time to exhaust *Brady*<sup>9</sup> and *Strickland*<sup>10</sup> claims based on the alleged discovery of Rey's statement naming Cervantes as Linda's actual killer. DE 49. The district court granted his motion, DE 54, but once back in state court, Trevino filed only a motion for appointment of counsel. Because state law does not allow for the appointment of counsel before permission has been granted to file a successive application, the trial court took no action on the motion for two years. And Trevino, rather than taking corrective action and filing an application in the Court of Criminal Appeals, complained to the federal district court, which then intervened in an attempt to force the trial court to act. DE 61. After two years, when no action had still be taken, the federal district court allowed Trevino to return to federal court and raise his *Brady* claims, finding the state process had been rendered ineffective to

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<sup>9</sup> *Brady v. Maryland*, 363 U.S. 83 (1963).

<sup>10</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

protect his constitutional rights. 28 U.S.C. § 2254(b)(1)(B). DE 62.

Ultimately, the district court denied relief in all aspects, but granted Trevino a certificate of appealability on three issues: (1), (2) whether *Trevino* had satisfied the materiality and prejudice prongs of *Brady* and *Strickland*, respectively, regarding Rey's second statement, and (3) whether Trevino had established a fundamental miscarriage of justice so as to overcome the procedural bar applied to his claim of ineffective assistance of counsel for failure to investigate and present mitigating evidence. *Id.* at 111-17. On appeal to the Fifth Circuit, Trevino requested a COA on five additional issues. The circuit court affirmed the district court's denial of federal habeas relief and denied Trevino's request for an additional COA. *Trevino v. Thaler*, No. 10-70004 (5th Cir. Nov. 14, 2011).

### REASONS FOR DENYING THE WRIT

The Fifth Circuit explained the hurdles Trevino must overcome in order to obtain a COA and what the standard of review is where the district court has previously granted a COA:

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), "[b]efore any appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 335 [] (2003); 28 U.S.C. § 2253(c)(1). To meet this standard, Trevino must demonstrate "that reasonable jurists could debate (or for that matter, agree that) the petition should have been resolved in a different manner or that issues presented were adequate to deserve encouragement to proceed further." *Id.* (internal

quotations and citations omitted); accord *Tennard v. Dretke*, 542 U.S. 274, 288 [] (2004).

\* \* \*

"[A]bsent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief." *Orman v. Cain*, 228 F.3d 616, 619-20 (5th Cir. 2000); 28 U.S.C. § 2254(b)(1). Special circumstances permitting federal courts to review a claim before it has been exhausted in state court include (1) when there is an absence of state corrective process; or (2) when circumstances exist that render such process ineffective to protect the federal habeas petitioner's rights. 28 U.S.C. § 2254(b)(1)(B)(i)-(ii).

In reviewing an issue on which the district court granted COA, "we review the district court's findings for clear error and its conclusions of law *de novo*, applying the same standards to the state court's decision as did the district court." *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004).

*Trevino v. Thaler*, slip op. at 11-12.

Because Trevino was wholly unable to meet these standards, habeas relief was properly denied by the district court, and the appellate court affirmed that judgment and further denied Trevino a COA. Consequently, certiorari review is not merited in this case.

I. ***Martinez v. Ryan* Does Not Apply in Texas. But Even If It Does, Trevino's Defaulted Ineffective-Assistance-of-Counsel Claim Is Not "Substantial."**

In his second state habeas application, Trevino alleged that trial counsel was constitutionally ineffective for failing to investigate and present mitigating evidence. The Court of Criminal Appeals dismissed his application

as an abuse of the writ pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5. The district court procedurally barred the claim, finding that Trevino had established neither cause and prejudice nor a fundamental miscarriage of justice. DE 87 at 43-52. That court then granted a COA on the issue of whether Trevino had established a fundamental miscarriage of justice. *Id.* at 114-16. The court below found that he had not. *Trevino v. Thaler*, slip op. at 21-25. No ruling was made on the issue of cause and prejudice. Now, in an attempt to take advantage of the recent ruling in *Martinez*, Trevino asks this Court to grant certiorari on his argument that the lower court has never passed on, i.e., whether his claim of ineffective assistance of state habeas counsel constitutes cause so as to excuse his procedurally defaulted claim that trial counsel was ineffective.<sup>11</sup>

**A. *Martinez* does not apply in Texas.**

*Martinez* carved out a limited—and equitable as opposed to constitutional—exception to the general rule that ineffective assistance of state habeas counsel will not constitute cause to excuse a procedurally defaulted claim. 132 S. Ct. at 1319. The Court held that where state law provides that “initial-review collateral proceedings” are the first place ineffective-assistance-of-counsel claims may be raised, a petitioner may allege

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<sup>11</sup> Although his earliest opportunity to do so would have been in a petition for rehearing, Trevino did not assert that *Martinez* created cause so as to overcome the procedural default in the circuit court.



counsel at that stage was ineffective. *Id.* at 1318. The Court was careful to emphasize, though, that this rule "does not extend to attorney errors in any proceedings beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons." *Id.* at 1320.

The Fifth Circuit has recently explained that *Martinez* does not apply to procedurally defaulted claims of ineffective assistance of trial counsel in Texas:

The [Court of Criminal Appeals] made clear that a state habeas petition is the preferred vehicle for developing ineffectiveness claims. *Robinson v. State*, 16 S.W.3d 808, 809-10 (Tex. Crim. App. 2000). Yet Texas defendants may first raise ineffectiveness claims before the trial court following conviction via a motion for new trial, when practicable, and the trial court abuses its discretion by failing to hold a hearing on an ineffectiveness claim predicated on matters not determinable from the record. *Holden v. State*, 201 S.W.3d 761, 762-63 (Tex. Crim. App. 2003). A prisoner who develops such a record through a new trial motion can of course pursue the denial of an ineffectiveness claim through direct appeal, but the [Court of Criminal Appeals] has indicated that a motion for new trial is neither a sufficient nor necessary condition to secure review of an ineffectiveness claim on direct appeal. Indeed, an ineffectiveness claim may simply be raised on direct appeal without the benefit of a motion for new trial. *Robinson*, 16 S.W.3d at 813. As a result, both Texas intermediate courts and the [Court of Criminal Appeals] sometimes reach the merits of ineffectiveness claims on direct appeal. *Thompson v. State*, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999). Where they do not, Texas habeas proceedings remain open to convicted defendants. *Ex parte Nailor*, 149 S.W.3d 125, 129, 131 (Tex. Crim. App. 2004). In short, Texas procedures do not mandate that ineffectiveness claims be heard in the first instance in habeas proceedings, and they do not deprive Texas

defendants of counsel- and court-driven guidance in pursuing ineffectiveness claims.

*Ibarra v. Thaler*, 2012 WL 26205020 at \*4 (5th Cir. June 28, 2012), *motion for reconsideration filed* (July 26, 2012); *see also Adams v. Thaler*, 679 F.3d 312, 317 n.4 (5th Cir. 2012).

But more importantly, *Martinez* was only decided months ago. It would be premature for the Court to inject itself into this issue before it can percolate in the district and circuit courts. The Court “should give them some time to address the nuances of th[is] precedent[] before adding new ones. As has been said, a plant cannot grow if you constantly yank it out of the ground to see if the roots are healthy.” *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting). In addition to treating Ibarra’s motion for reconsideration as a petition for rehearing en banc and calling for a response from the Director, the Fifth Circuit has also called for a response from the Director to a petition for rehearing en banc in *Gates v. Thaler*, No. 11-70023.

But even if this Court were to disagree and find that *Martinez* does apply to Texas, Trevino must also establish that his claim is “substantial.” *Martinez*, 132 S. Ct. at 1320. This he cannot do.

**B. Trevino was not denied constitutionally effective assistance in any event; thus, his claim is not “substantial.”**

Trevino’s ineffective assistance claim is governed by the two-part test set forth in *Strickland v. Washington*, which requires him to establish both



deficient performance and resultant prejudice. 466 U.S. at 687-88, 690. Importantly, failure to prove either deficient performance or resultant prejudice will defeat an ineffective-assistance-of-counsel claim, making it unnecessary to examine the other prong. *Id.* at 687.

In order to demonstrate deficient performance, Trevino must show that, in light of the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," i.e., "prevailing professional norms." *Id.* at 689-90. The Supreme Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effect of hindsight."<sup>12</sup> *Strickland*, 466 U.S. 689-90; *see also Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) ("It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'"); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Accordingly, there is a "strong presumption" that the alleged deficiency "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

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<sup>12</sup> "Representation of a capital defendant calls for a variety of skills. Some involve technical proficiency connected with the science of law. Other demands relate to the art of advocacy. The proper exercise of judgment with respect to the tactical and strategic choices that must be made in the conduct of a defense cannot be neatly plotted in advance by appellate courts." *Stanley v. Zant*, 697 F.2d 955, 970 & n.12 (11th Cir. 1983).

Even if deficient performance can be established, Trevino must still affirmatively prove prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. This requires him to show a reasonable probability that but for counsel's deficiencies, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Id.* The mere possibility of a different outcome is insufficient to prevail on the prejudice prong. As recently explained by the Supreme Court: The question in conducting *Strickland's* prejudice analysis "is *not* whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible [the jury would have reached a different verdict] if counsel [had] acted differently." *Richter*, 130 S. Ct. at 791-92 (emphasis added and citations omitted). Rather, "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 792 (citation omitted).

Where, as here, a federal habeas petitioner alleges constitutionally ineffective assistance during the punishment phase of a death penalty trial, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer [] would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695; see also *Riley v. Cockrell*, 339 F.3d 308, 315 (5th Cir. 2003) ("If the petitioner brings a claim of ineffective assistance with regard to the sentencing phase,

he has the difficult burden of showing a reasonable probability that the jury would not have imposed the death sentence in the absence of errors by counsel." (internal quotation marks and citation omitted)). "In assessing prejudice, [the reviewing court] reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

While the circuit court did not pass on the merits of this claim, the district court did so in the alternative:

[Trevino's] "new" mitigating evidence consists of double-edged evidence detailing [his] history of childhood abuse and neglect (both physical and emotional), alcohol and narcotics abuse, spotty attendance and poor performance in school, Fetal Alcohol Syndrome, and ensuing tendency to exercise poor judgment. Despite the foregoing, however, [Trevino] also furnishes a number of affidavits that describe [him] as a hard-working, non-violent, loving father. This "new" mitigating evidence must also be weighed in the context of other, uncontradicted, evidence now before this Court, which shows (1) [Trevino's] callous comments regarding [Linda] before and after her murder (including [his] suggestion that Gonzales should participate in the sexual assault on [Linda] and [his] failure to object when Rey and Cervantes suggested the need to eliminate witnesses), (2) [Trevino's] participation in the violent sexual assault upon [Linda] (*i.e.*, holding her down while others sexually assaulted her), (3) [Trevino's] subsequent directive to Gonzales not to talk to police about the incident, (4) [Trevino's] nonchalant demeanor immediately following the murder upon his return to the party at the Mata residence, (5) [Trevino's] many tattoos reflecting membership in a notorious prison gang, and (6) the complete and total absence of any indication [Trevino] has ever expressed sincere contrition or genuine remorse over [Linda's] murder.

The latter point cannot be overemphasized. [Linda's] murder was particularly brutal and senseless. Yet [Trevino] has consistently refused to acknowledge his role in her murder, even to his own trial counsel, claiming instead to have been "too stoned" to remember exactly what happened that evening. [Trevino's] own affidavit, executed on June 11, 2004, contains not even a scintilla of sincere contrition; instead[,] [he] expresses hostility and blames his trial counsel for allegedly misrepresenting the terms of a proffered plea bargain for a life sentence without accepting any responsibility for his own rejection of the other offer after it was accurately described to [him].

Absent some indication [Trevino] has willingly accepted responsibility for his role in [Linda's] brutal rape and murder, the evidence showing [his] long history of alcohol and drug abuse, long history of criminal misconduct, and membership in a violent street and prison gangs precludes this Court from finding this aspect of [his] ineffective assistance claim herein satisfies the prejudice prong of *Strickland*. There is simply no reasonable probability that, but for the failure of [Trevino's] trial counsel to present [Trevino's] capital sentencing jury with the additional, double-edged mitigating evidence now before this Court, the outcome of the punishment phase of [Trevino's] capital trial would have been different.

*Trevino v. Thaler*, DE 87 at 52-55 (footnotes omitted).

Thus, given the brutality visited on Linda Salinas by Trevino and his friends that night, his criminal history, his history of alcohol and substance abuse, and his complete lack of remorse, the likelihood of a different outcome, while conceivable, was certainly not substantial. *See Martinez*, 132 S. Ct. at 1321 (remanding for a determination of whether the claim of ineffective assistance of counsel was "substantial"); *see also Richter*, 131 S. Ct. at 792

(emphasizing that “[t]he likelihood of a different result must be substantial, not just conceivable”) (citation omitted).

For these reasons, certiorari review is not warranted.

**II. Trevino's *Brady* Claims Are Procedurally Defaulted from Federal Habeas Review. In Any Event, the Fifth Circuit Did Not Err in Ultimately Concluding that these Claims Are Meritless.**

Having returned to federal court after unsuccessfully raising the previous claim of ineffective assistance of trial counsel in state court, Trevino again sought a stay to return to state court, this time based on “federal habeas counsel’s discovery in the state’s files of a written statement dated June 12, 1996 given by Rey indicating that Cervantes, not Trevino, stabbed [Linda].” *Trevino v. Thaler*, slip op. at 6; see also DE 49. Trevino asserted *Brady* claims (and concomitant *Strickland* claims) relative to both the guilt/innocence trial and the punishment trial. DE 49. The lower courts both excused the default, finding that the state process had been rendered ineffective to protect Trevino’s constitutional rights, 28 U.S.C. § 2254(b)(1)(B)(ii), but on de novo review, concluded that Trevino could not establish a *Brady* claim.

A. Because these claims were not presented to the state court in a procedurally correct manner, they are procedurally defaulted.<sup>13</sup>

The exhaustion requirement codified at 28 U.S.C. § 2254(b)(1) reflects a policy of comity consistently adhered to by the Court. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-10 (1992). Thus, before a federal court will entertain the alleged errors, a petitioner must have first provided the state's highest court with a fair opportunity to apply (1) the controlling federal constitutional principles to (2) the same factual allegations. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). This requirement is designed to give state courts the initial opportunity to pass on and, if necessary, correct errors of federal law in a state prisoner's conviction. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). The purpose of exhaustion "is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court." *Keeney*, 504 U.S. at 10; see also *Cullen Pinholster*, 131 S. Ct. 1388, 1398 (2011) (reiterating that the 'broader context of the statute as a whole' [] demonstrates Congress' intent to channel prisoners' claims first to the state courts") (citation omitted). To that end, AEDPA proscribes granting relief on an unexhausted claim unless "there is

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<sup>13</sup> The district court rejected the Director's contention regarding the procedural default. DE 87 at 21-22. The circuit court did as well. *Trevino v. Thaler*, slip op. at 13 & n.5.



an absence of available state process, or circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(i)-(ii). Here, both the federal district court and the lower court found that Trevino’s failure to exhaust the instant *Brady* and *Strickland* claims should be excused because the state process was rendered ineffective when the trial court took no action on his motion for appointment for counsel. *Trevino v. Thaler*, slip op. at 6, 13 & n.5. But as discussed below, this was incorrect.

1. **Ineffective state process has not been established.**

Neither this Court nor the Fifth Circuit has established a bright-line test for determining when the state process has been rendered ineffective. However, the Fifth Circuit has used the *Barker*<sup>14</sup> factors as guidance. Those factors include (1) the length of the delay, (2) the reasons for the delay, (3) the defendant’s assertion of his right, and (4) the prejudice to the defendant occasioned by the delay. *See Rheuark v. Shaw*, 628 F.2d 297, 302-04 (5th Cir. 1980). But the court has cautioned that “noncompliance with the exhaustion doctrine [should be excused] *only* if the inordinate delay is wholly and completely the fault of the state.” *Deters v. Collins*, 985 F.2d 789, 796 (5th Cir. 1993) (emphasis in original, citations omitted). “Petitioners without

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<sup>14</sup> *Barker v. Wingo*, 407 U.S.514 (1972) (setting forth factors for reviewing courts to look to when assessing a claim that a defendant’s right a speedy trial was violated).



clean hands—those who contribute to the excessive delay—will not be heard to complain of the delay they have caused and thus will not be excused from the exhaustion doctrine.” *Id.* (citations omitted). In the instant case, Trevino cannot be said to have clean hands; thus, his failure to exhaust these claims should not be excused.

After the district court granted Trevino’s motion to stay and abate the federal habeas proceedings so that he could return to state court to exhaust this bundle of claims, Trevino filed *only* a motion for appointment of counsel. But federal habeas counsel should have been well aware that state law does not provide for the appointment of counsel on a successive state habeas application unless and until the Court of Criminal Appeals finds the application meets one of the exceptions to Texas Code of Criminal Procedure Article 11.071, Section 5. *See* Tex. Code Crim. Proc. art. 11.071 §§ 2, 5.

In response to the Director’s second motion to lift the stay, DE 59, Trevino wrote: “Current appointed counsel in federal court does not have sufficient resources to adequately represent Petitioner pro bono in state court, and Petitioner is without the necessary skills and knowledge himself to navigate the difficult, treacherous, and often hazardous waters of state habeas.” DE 60 at 3. Despite these proclamations, however, federal habeas counsel had previously filed a successive state habeas application—raising the previously discussed claim of ineffective assistance of counsel for failure

to investigate and present mitigating evidence and a claim that Trevino's execution would violate the Eighth Amendment as interpreted by *Atkins v. Virginia*, 536 U.S. 304 (2002), because he has Fetal Alcohol Syndrome—pro bono. Certainly these claims are far more in need of counsel and require far more resources than the relatively simple *Brady* claims Trevino chose to take a stand on. Indeed, the record establishes that counsel conducted an extensive investigation in support of those claims—never complaining about a lack of resources to any court. *See* DE 87 at 52-53 & n.59. In other words, regarding the ineffective-assistance-of-counsel claim, no motion for appointment of counsel was ever filed, much less denied or not acted on. And Trevino certainly did not file a pro se application for state writ of habeas corpus.

Finally, to the extent federal habeas counsel might have believed he needed to be appointed in order to conduct an investigation, state law does not provide for such. *See* Tex. Code Crim. Proc. art. 11.071 §§ 2, 5. Commenting on the legislature's determination that funding is not available until the requirements of Section 5 have been met, the state court wrote: "That is the hurdle the Legislature has deemed appropriate for the subsequent applicant who has, for whatever reason, bypassed his opportunity to avail himself of the resources to which he would have been entitled had he raised the issue in an initial writ application, when it was factually and

legally available to him." *Ex parte Blue*, 230 S.W.3d 151, 166-67 (Tex. Crim. App. 2007).

Both the lower court and the federal district court concluded that because the trial court "failed or refused to appoint counsel for Trevino [for over two years], despite explicit entreaties from the district court," the state process was rendered ineffective, thus excusing Trevino's failure to exhaust the instant *Brady* claims. *Trevino v. Thaler*, slip op. at 6, 13 & n.5. But as explained above, state law does not allow for the appointment of counsel unless and until a successive state habeas application has been found to meet the requirements of Article 11.071, Section 5. Indeed, it is questionable whether the convicting court has the discretion to do anything until the Court the Criminal Appeals determines that the statutory requirements for filing a successive application have been met. *See* Tex. Code Crim. Proc. art. 11.071, § 5(c). If Trevino wanted to force the trial court's hand, he could very well have filed his successive habeas application so that the Court of Criminal Appeals could make its ruling.

Regardless, federal habeas counsel—who has also been acting as state habeas counsel—knew the rules; the record establishes that. And the record belies his excuse that he was unable to file a third successive application pro bono. An admittedly more complicated successive state habeas application had been previously filed without the benefit of court-appointed counsel

and/or funding—by the same federal habeas counsel who now complains that he was unable to file such without funding, the same federal habeas counsel who “discovered” the statement giving rise to the instant *Brady* claims.

Because Trevino cannot say that the delay was “wholly and completely the fault of the state,” he should not be able to claim ineffective state process. Thus, his claims based on the alleged unavailability of Rey’s second statements are procedurally barred. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1989).

**B. *Brady’s* mandate was not violated relative to Siendo “Sam” Rey’s second statement to police.**

Trevino alleges that the State failed to turn over a statement made by Rey indicating that Cervantes—not Trevino—actually killed Linda. In this statement, Rey says: “When Santos comes back up the creek I asked him where the girl was at. He told me ‘Fuck that bitch, she didn’t want to give it up so I stabbed her.’” In the courts below, Trevino contended that this directly contradicted the State’s evidence at trial pointing to Trevino as the one who stabbed Linda to death, including the testimony of Juan Gonzales. His argument goes that if this statement had been available, defense counsel could have established reasonable doubt regarding who actually killed Linda by impeaching in Gonzales’s testimony and more effectively cross-examining Detective Gresham. Regardless of whether the Fifth Circuit was correct in

its use of extra-record evidence, Trevino simply cannot establish materiality because a complete reading of the record demonstrates (1) that counsel did in fact create reasonable doubt as to who actually killed Linda, but (2) Trevino was charged as a party.

1. The Fifth Circuit's use of Rey's third statement does not warrant certiorari review because, as discussed above, Trevino's *Brady* claims are procedurally defaulted. Second, as discussed below, the court relied on judicial notice, not it "inherent equitable authority." Finally, the claims are ultimately without merit.

In determining that Trevino had failed to establish a *Brady* violation, the Fifth Circuit took judicial notice of a third statement given by Rey. This statement had not been previously placed in the record during the federal habeas proceedings. *Trevino v. Thaler*, slip op. at 6-10 & n.9; see also *id.* at 14-17. *Amici* suggest a circuit split exists regarding whether the circuit courts have inherent authority to consider evidence outside the record in rare, limited circumstances. However, they cite no case directly establishing a such a split; rather, the cases cited merely state a rule, that like many rules, applies differently in different situations.

Even if there was a circuit split, this case is not the proper vehicle for the Court to resolve it. The Fifth Circuit did not consider Rey's third statement based on any "inherent equitable authority" or Rule 10(e). Instead, the majority simply took judicial notice of the statement. See

*Trevino v. Thaler*, slip op. at 9 n.3. Therefore, regardless of whether the court misapplied the legal principles of judicial notice, its action does not squarely implicate the purported circuit split, which involves a distinct issue. At worst, this was an isolated error not worthy of certiorari review. Moreover, Trevino's *Brady* claims are both procedurally defaulted, as discussed above, and without merit, as discussed below.

2. Trevino simply cannot establish a *Brady* violation.

To establish a due process violation arising from the State's failure to disclose exculpatory evidence, Trevino must demonstrate that (1) the prosecution suppressed evidence; (2) the evidence was favorable to him; and (3) the evidence was material to either guilt or punishment. *Brady*, 373 U.S. at 87. *Brady's* disclosure requirements extend to materials that may be used to impeach a witness. *Strickler v. Greene*, 527 U.S. 263, 282 n.21 (1999). The prosecution, however, has no duty "to make a complete and detailed accounting of all investigatory work done." *Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir. 1994) (citations omitted). Finally, evidence is constitutionally "material" "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1995); see also *Miller v. Dretke*, 404 F.3d 908, 913-16 (5th Cir. 2005) (emphasizing the "reasonable probability" prerequisite to materiality). "The mere possibility that an item



of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Argurs*, 427 U.S. 97, 109-10 (1976). Rather, the suppression must undermine confidence in the trial. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

- a. **Because Trevino's trial attorneys were on notice of the existence of Rey's statement, Trevino cannot establish suppression.**

While Rey's actual statement may not have been in the State's file, that file did contain a supplementary police report filed by Detective Gresham. DE 53 at Exhibit A. On page 17 of that report there is a summary of the statement Rey gave to police including: "Seanido [sic] stated Santos returned after about fifteen minutes and when he asked him where the girl was at Santos told him he killed her." In the district court, the prosecutors and defense counsel provided competing affidavits. *See* DE 53 at Exhibits B-E. But as the circuit court explained:

[T]he record of Trevino's first state habeas proceeding is inconsistent with the affidavits of Trevino's attorneys. During the proceeding Wilcox and Mario Trevino both gave testimony strongly suggesting that they had evaluated the witness statements in Gresham's report. Mario Trevino testified that he had been given access to statements of the prosecution's potential witnesses, as well as various police reports, and that he was aware of at least "two guys that gave statements that were pointing the finger to Mr. Trevino." Wilcox went further and testified that because he knew that *all* of the [S]tate's potential witnesses would inculcate Trevino, Wilcox had adopted a trial



strategy of not calling any witnesses while instead relying on cross-examination in an attempt to create reasonable doubt. The potential witness list that prosecutors provided to Trevino's attorneys prior to trial included Rey.

*Trevino v. Thaler*, slip op. at 10. Based on this record, then, the circuit court determined that defense counsel should have been "on notice that Rey had made one statement to police suggesting that Cervantes had stabbed [Linda]. The onus was then on Trevino's lawyers to request a copy of the full statement." *Id.* at 14 (citing *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997) (failure to discover material evidence must not be the result of the lack of due diligence); *see also Gonzales v. Quarterman*, 458 F.3d 384, 392 (5th Cir. 2006) (evidence not suppressed where defense counsel knew of information that would have enabled them to discover results of a luminol test had they questioned the defendant or the officers who gave the test); *United States v. Runyan*, 290 F.3d 223, 246 (5th Cir. 2002) ("Evidence is not 'suppressed' if the defendant knows or should know of the essential facts that would enable him to take advantage of it. ... The Government is not required, in other words, to facilitate the compilation of exculpatory material that, with some industry, defense counsel could marshal on their own.") (citation omitted); *see also Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2005) (prosecutor does not violate *Brady* by failing to disclose evidence contained in defendant's medical records where defendant possessed salient facts regarding the

existence of the records, knew that he had made frequent visits to medical personnel, and knew that he was taking medication that they had prescribed for him); *United States v. Zagari*, 111 F.3d 307, 320 (2d Cir. 1997) ("*Brady* cannot be violated if the defendants have actual knowledge of the relevant information); *United States v. Zackson*, 6 F.3d 911, 919 (2d Cir. 1993) (finding no suppression where defendant "had sufficient access to the essential facts enabling him to take advantage of any exculpatory material that may have been available"). Here, the record plainly establishes that defense counsel were on notice regarding the existence of Rey's statement. Thus, Trevino cannot establish suppression as required by *Brady*.

- b. **Regardless, because the record establishes that defense counsel was able to do exactly what Trevino says should have been done with Rey's second statement—put the knife in Cervantes's hands—Trevino cannot establish materiality.**

- i. **Guilt/innocence**

Trevino cannot establish materiality because the claim rests on a flawed reading of the record. The *evidence presented to the jury* does not clearly establish that Trevino had a knife, much less that he was the one who stabbed Linda. If anything, Gonzales's testimony puts the knife in Cervantes's hands—exactly what Trevino wants to do with Rey's statement.

In its opening statement, the State told the jury: "We expect the evidence to show that Carlos volunteered to them [the others involved in

Linda's rape and murder] that he learned how to choke people and he learned how to use a knife." 16 RR 16. And the State expected this would be done through Gonzales's testimony. Before Gonzales testified, however, a hearing regarding the specifics of his testimony was held *outside the presence of the jury*. 18 RR 137-65. During that hearing, Gonzales testified about a conversation between Cervantes and Trevino—that seems to clearly indicate Trevino was the one responsible for stabbing Linda—as follows:

Q. What do you remember them saying?

A. Santos said it was - - I don't remember if he said "cool" or some other word about snapping her neck.

Q. And he said it was cool about snapping her neck?

A. Uh huh. ...

Q. All right. And then what was the rest of the sentence he said?

A. "*It was cool how you used that knife.*" ...

Q. All right. Did Carlos respond to that?

A. Yes.

Q. And what did he say?

A. He said, "I learned how to kill in prison."

18 RR 142-44 (emphasis added). But the testimony that *was presented to the jury* was not nearly as clear and certainly did not indicate that Trevino had "learned how to kill *in prison*":<sup>15</sup>

Q. And what happens next?

A. And then Santos said something about being cool about snapping her neck.

Q. Who was he talking to when he said that?

A. To Carlos.

Q. All right. And I couldn't quite hear you. Did you say, "Being cool while snapping her neck?"

A. I don't remember the word he said.

Q. Are you saying he said something like that?

A. Yes, ma'am.

Q. All right. And did Carlos say anything in response to that?

A. He said, "I learned how to kill." ...

Q. All right. Once everyone was in the car, *does Santos say anything about a weapon?*

A. No, ma'am.

Q. All right.

A. Oh yeah.

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<sup>15</sup> The prosecution explained to the trial court that Gonzales had been told not say "in prison" when testifying in front of the jury if so instructed. 18 RR 146; see also *id.* at 153-54 (Gonzales instructed on the record).

Q. What does he say?

A. *He said something about using a knife.*

Q. Did you see the knife?

A. No, ma'am.

19 RR 5-6 (emphasis added). Thus, the State did *not*, as it had during the hearing outside the presence of the jury, clearly tie the knife to Trevino. Indeed, the knife was tied to Cervantes.

On cross-examination, defense counsel was able to more clearly able to put the knife in Cervantes's hands as follows:

Q. It was Santos with the knife. Is that correct?

A. I didn't see him with the knife.

Q. Remember making the statement to that effect to the district attorney's office?

A. Yes, sir.

Q. You told them Santos had the knife. Right?

A. He had a knife like two days before, but I don't know if he still had it.

Q. But you told them Santos had a knife. Right?

A. Yes, sir.

Q. You also told them that it was Santos that got rid of that knife two days later. Right?

A. Yes, sir.

Q. Not you. Right. You're not the one with the knife. You're not the one who got rid of the knife?

A. No. ...

Q. *Was it Carlos with the knife?*

A. *I don't know.*

Q. And he didn't get rid of that knife?

A. No.

Q. *And it was Santos that you asked, "Why did you kill Linda Salinas," isn't it?*

A. *Yes, sir.*

Q. What did he tell you?

A. To mind my own business.

Q. It was the same Santos who two days later told you that he broke up that knife and threw it into a river?

A. Yes, sir.

19 RR 28-30 (emphasis added). Thus, defense counsel was able to put at the knife *in Cervantes's hands* and identify him as the actual killer, exactly what Trevino contends they could have done with Rey's statement.

Finally, on re-direct, the State elicited the following testimony:

Q. All right. And with regard to those statements - - well, how did you know Linda was dead?

A. Because of what Santos had said in the car.

Q. All right. Did you also know because of what Carlos said in the car?

A. Yes. ...

Q. And when you say that Santos was responsible, how do you come to that conclusion?

A. Because two days before at Jay's house, he had a knife.

19 RR 44-45. By the end of Gonzales's testimony, Trevino was—at best—possibly responsible for snapping Linda's neck, something the autopsy revealed did not happen anyway. There was no clear evidence that Trevino had stabbed her or ever even had possession of a knife. But there was evidence tying Cervantes to a knife—a knife he destroyed two days after Linda's murder—and it was Cervantes who was responsible for Linda's murder, at least according to Gonzales.

After Gonzales's testimony, the medical examiner confirmed that the cause of death was two stab wounds to the neck. 19 RR 68. On cross-examination, the defense attempted to cast reasonable doubt on the inference that Trevino had snapped Linda's neck by eliciting testimony that her neck was not broken, and there was no bruising or lacerations suggesting someone might have tried to do so. *Id.* at 85.

Ultimately, Trevino was one of five men—and the only one of the three most culpable for Linda's murder who did not accept a plea bargain—who brutally raped a fifteen-year-old girl, killed her "because we don't need no



witnesses,"<sup>16</sup> and then set fire to her backpack and other belongings in an attempt to destroy evidence. He also warned Gonzales not to talk to the police. And Trevino has never denied taking part in the brutality that occurred on June 9, 1996. During the state habeas hearing, one of Trevino's lawyers testified that Trevino had admitted to being present when Linda was raped and murdered; he just did not remember exactly what happened because he was "too stoned." SHRR 33-38.<sup>17</sup>

But putting all of that aside, Trevino was charged as a party. As was explained to the jury: "Our law provides a person is criminally responsible as a party to an offense if the offense is committed by his own conduct, or by the conduct of another for which he is criminally responsible, or by both." 2 CR 150. In short, the jurors did not need to be convinced beyond a reasonable doubt that Trevino was the one who actually stabbed Linda in order to convict him of capital murder. They only had to be convinced that Trevino understood that Linda would be killed that night, something the evidence establishes that beyond a reasonable doubt.<sup>18</sup>

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<sup>16</sup> 18 RR 191.

<sup>17</sup> "SHRR" refers to the Reporter's Record of transcribed state habeas proceedings, followed by page number(s).

<sup>18</sup> As the prosecutor explained to the jury during closing argument: "*Whether you choose to believe he actually plunged that knife into her or not, you know that when she went down this path and they had that conversation, it was his conscious objective and desire not to go back to prison, not to have any witnesses, to kill Linda*

Whatever the State told the jury during its opening statement was not borne out by the evidence at guilt/innocence. As it stood at the end of the trial, the evidence did not clearly put the knife in Trevino's hands, but there was no doubt he was there that night, that he was an active participant in the brutal assault on Linda, that he was—at the very least—complicit in her murder.

For all of these reasons, Trevino cannot establish a "reasonable probability" that "the result of the [guilt/innocence] proceeding would have been different." *Bagley*, 473 U.S. at 682.

## ii. Punishment

Trevino also contended that Rey's statement would have given the jury something on which to base a negative answer to the second special issue, the so-called anti-parties charge:

Do you find from the evidence beyond a reasonable doubt that Carlos Trevino, the defendant himself, actually caused the death of Linda Salinas, the deceased, on the occasion in question, or if he did not actually cause the deceased's death, that he intended to kill the deceased or another, or that he anticipated that a human life would be taken?

---

Salinas." 24 RR 20 (emphasis added). The prosecutor went on to argue: "You can infer from the evidence that he committed sexual assault. *You can infer from the evidence that he's the actual killer. And if you don't believe that, you certainly have ample evidence to know exactly what his intent was out there that day was.*" *Id.* at 43-44 (emphasis added).

2 CR 179, 186. But the evidence more than supports the jury's affirmative answer to this question. Most importantly, Gonzales testified that *both* Cervantes *and* Trevino had blood on their shirts when they came back to the car. Combined with Trevino's statement "[w]e'll do what we have to do," 18 RR 191, or "[d]o what you have to do," 19 RR 33-34, in response to Rey's statement that "we don't need no witnesses," 18 RR 191, this is certainly enough for the jury to infer that Trevino—at the very least—"anticipated that a human life would be taken." Thus, as with the guilt/innocence trial, the availability of Rey's statement would not have changed the outcome.

On the whole of this record, then, Trevino simply cannot establish that the result of the punishment trial would have been different, even if defense counsel had and/or could have used Rey's statement.<sup>19</sup>

For these reasons, certiorari review should be denied.

### CONCLUSION

For the foregoing reasons, the Director respectfully requests that this Court deny Trevino's petition for writ of certiorari.

Respectfully submitted,

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<sup>19</sup> As stated above, Trevino raised concomitant *Strickland* claims relative to Rey's statement. Both the circuit court and the district court, however, found Trevino had failed to establish either deficient performance or resultant prejudice for essentially the same reasons he could not establish materiality under *Brady*. See *Trevino v. Thaler*, slip op. at 17; DE 87 at 40-41.

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# **REPLY BRIEF**

**No. 11-10189**

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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**CARLOS TREVINO,**

*Petitioner,*

**V.**

**RICK THALER,**

**Director, Texas Department of Criminal Justice,  
Correctional Institutions Division,**

*Respondent.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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**REPLY TO RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

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## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

### OVERVIEW

In addressing the first question Mr. Trevino presented to this Court, Respondent first contends that because the Fifth Circuit has determined that this Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) does not apply to Texas, this Court should deny Mr. Trevino's petition. However, the question of the applicability of *Martinez* to Texas cases is, by the Fifth Circuit's own action, still an unsettled question. Respondent then contends that Mr. Trevino's *Wiggins* claim is not "substantial" as required for review under *Martinez*. But *Martinez* puts the "substantial" question in the context of a standard for a certificate of appealability to issue; i.e., whether the claim is debatable amongst jurists of reason. Mr. Trevino was granted a certificate of appealability on this issue for exactly that reason. His claim is substantial. Mr. Trevino's request to stay his appeal in the Fifth Circuit pending this Court's decision in then-pending *Martinez* was denied. He was not afforded an opportunity to litigate that question in the Fifth Circuit, and denial of his petition at this point will deprive him of presenting such an argument for review at any level.

In addressing the second question Mr. Trevino presented to this Court regarding the extraordinarily flawed judicial process employed by the Fifth Circuit in addressing Mr. Trevino's *Brady* and associated ineffective assistance of counsel claims - Respondent begins by raising an argument already rejected by both the District Court and the Fifth Circuit. Respondent argues that both courts erred by deciding that Mr. Trevino was excluded from the exhaustion requirement on this question by an ineffective state process. In renewing that argument, Respondent again presents a misleading description of Texas law on the issue.

Respondent then proceeds to argue that Mr. Trevino cannot establish materiality with regard to those issues because, at trial, he successfully established reasonable doubt as to who actually killed

the victim. However, Respondent notes that said success is not determinative because Mr. Trevino was charged under Texas' law of parties. Since Respondent thus concedes that Mr. Trevino could only be found not guilty of actually committing the offense, the only remaining question is whether, under the law of parties, it was committed by another for whom he is criminally responsible. But the statement Mr. Trevino complains was suppressed, makes it clear that the declarant, Mr. Rey, decided to commit both the rape and the murder on his own, when he found that the victim "didn't want to give it up." Such statement would have been invaluable in contesting Mr. Trevino's culpability under the Texas law of parties at trial.

Beyond that, Respondent's only response to this question is that "[a]t worse, this was an isolated error not worthy of certiorari review." But even an "isolated error" leading to a wrong, or at least questionable, decision in a death penalty case is surely a serious matter. The error would only be magnified if this Court declines to exercise its supervisory powers and clearly indicate to the Fifth Circuit that such a flawed judicial process cannot be permitted to stand - or to reoccur in the future. This Court should grant review of this question.

**L. Mr. Trevino's Reply to Respondent's Brief in Opposition to His First Question Regarding Trial Counsel's Ineffectiveness under *Wiggins***

**A. The Question of the Applicability of *Martinez* to Texas, is Still Unresolved in the Fifth Circuit**

The Fifth Circuit held that review of Mr. Trevino's claim that trial counsel was ineffective under *Wiggins v. Smith*, 539 U.S. 510 (2003), was procedurally barred by the failure of Mr. Trevino's first state habeas counsel to bring this claim in his first state habeas proceeding. *Trevino v. Thaler*, 449 Fed. Appx. 415 (5th Cir. 2011), Appendix A to the Petition for Writ of Certiorari, at 23 [identified therein as *Trevino v. Thaler*, No. 10-70004 (5th Cir. November 14, 2011)]. Anticipating that the eventual decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), might provide a basis for arguing "cause" for this default by state habeas counsel, Mr. Trevino asked the Fifth Circuit to stay his appeal until *Martinez* was decided, but the court declined, issuing its opinion on November 14, 2011, and denying rehearing on January 31, 2012. *Martinez* was decided March 20, 2012, and thus Mr. Trevino never had the opportunity to present his *Martinez*-based argument to the Fifth Circuit.

In the interim between the filing of Mr. Trevino's petition for writ of certiorari and the present, the Fifth Circuit has decided that *Martinez* does not apply to Texas. *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012). As Respondent acknowledges, *Ibarra* has been the subject of a number of requests for rehearing en banc in the Fifth Circuit, and in at least one case, *Gates v. Thaler*, No. 11-70023, the Fifth Circuit has directed the respondent to file a response to the rehearing petition. Respondent argues that since the applicability of *Martinez* is still percolating in the Fifth Circuit, the Court should allow that process to take its course and not intervene by granting certiorari in Mr. Trevino's case.

Since Respondent filed his brief in opposition, further developments have taken place with respect to the *Martinez-Ibarra* question. On August 21, 2012, the Fifth Circuit denied rehearing en banc and a stay of execution on the question of whether *Ibarra* conflicted with *Martinez* in *Balentine v. Thaler*, No. 12-70023, 2012 U.S. App. LEXIS 17753 (5th Cir. Aug. 21, 2012). Four judges dissented from the denial of rehearing. *Id.* The next day, this Court granted a stay of execution. *Balentine v. Thaler*, No. 12-5906, 2012 U.S. LEXIS 5078 (U.S. August 22, 2012). For the Court to do this, it had to determine, inter alia, that there is (1) a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; and that there is (2) a significant possibility of reversal of the lower court's decision. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). This message appears not to have been lost on the Fifth Circuit. In the wake of this Court's action in *Balentine*, on August 27, 2012 the Fifth Circuit moved the oral argument in the case of *Rayford v. Thaler*, No. 12-70004 -- a case in which the only issue in the application for a certificate of appealability is the applicability of *Martinez* to Texas, *Id.*, Docket Item May 14, 2012 (Application for Certificate of Appealability and Brief in Support) - from October 2, to December 4, 2012. *Id.*, Docket Item August 27, 2012. There now appears to be stronger percolation going on in the Fifth Circuit with respect to the threshold issue of whether *Martinez* applies to Texas, and if the move of the *Rayford* oral argument is indicative of this, the Fifth Circuit is anticipating that it will act between now and December 4.

In light of the acknowledged percolation that now seems to be going on in the Fifth Circuit concerning this issue, this Court should hold Mr. Trevino's case until the Fifth Circuit has decided whether to rehear *en banc* its ruling that *Martinez* does not apply to Texas. Following the Fifth Circuit's disposition of the *en banc* question, this Court should either remand in light of *Martinez*,

or allow Mr. Trevino to present a supplement to his petition for certiorari arguing why the Court should grant certiorari to decide whether the Fifth Circuit is wrong in holding in holding that *Martinez* does not apply in Texas. Despite all his efforts in anticipation of the decision in *Martinez*, Mr. Trevino was not allowed an appellate process in the Fifth Circuit that took *Martinez* into consideration. To deny certiorari now, simply because the Fifth Circuit still appears to be struggling with the applicability of *Martinez* to Texas, makes no sense and would be starkly unfair to Mr. Trevino. Upon denial of certiorari, his execution will be scheduled, and then he would be forced to litigate the *Martinez-Ibarra* question along the same track as *John Balentine*. This should not happen.

**B. Mr. Trevino Was Granted a Certificate of Appealability Precisely on the Standard Required by *Martinez* for Presenting a “Substantial” Claim**

*Martinez* held that, in states where its rule applies, a habeas petitioner must be allowed to show that state habeas counsel was ineffective as cause for the default of a trial ineffectiveness claim so long as the “underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” Cf. *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue). *Martinez*, 132 S.Ct. at 1318-19. *Miller-El* makes clear that this showing of merit need “not demonstrate an entitlement to relief” 537 U.S. at 337. The court must instead “ask whether th[e] [claim] [i]s debatable amongst jurists of reason,” and “[t]his threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims.” *Id.* at 336.

By the district court’s own assessment, Mr. Trevino’s *Wiggins* claim meets this test, because the court granted a certificate of appealability on the *Wiggins* claim.



Thus, notwithstanding the district court's disparagement of the claim, as noted by Respondent, the court found the claim at least debatable on the merits, and that is all that *Martinez* requires for its protections to be triggered. As the District Court noted in its grant of a certificate of appealability on Mr. Trevino's *Wiggins* claim:

[Mr. Trevino's] . . . complaint of ineffective assistance arising from his trial counsel's failure to adequately investigate petitioner's background and develop and present mitigating evidence during the punishment phase of his trial regarding petitioner's deprived and abusive childhood, was procedurally defaulted. Reasonable minds could not disagree on this point. Nonetheless, reasonable minds could disagree over whether petitioner has satisfied the "fundamental miscarriage of justice" exception to the procedural default doctrine in connection with this claim. Petitioner's federal habeas counsel has presented this Court with evidence suggesting petitioner suffers from the effects of Fetal Alcohol Syndrome, including the inability to express remorse in a recognizable manner. Furthermore, petitioner has presented this Court with evidence showing even the most minimal investigation into petitioner's background (through rudimentary interviews with family members and review of relevant school and medical records) would have revealed a wealth of additional mitigating evidence far more substantial than the superficial account of petitioner's childhood given by petitioner's lone witness during the punishment phase of trial. Under these circumstances, reasonable minds could disagree over whether petitioner has satisfied the fundamental miscarriage of justice exception to the procedural default doctrine with regard to his *Wiggins* claim, i.e., petitioner's complaint that his trial counsel rendered ineffective assistance at the punishment phase of trial by failing to (1) adequately investigate petitioner's background and (2) discover, develop, and present available mitigating evidence.

*Trevino v. Thaler*, 678 F. Supp. 2d 445, 497-98 (W.D. Tex., 2009).

For these reasons, Mr. Trevino's petition for writ of certiorari should be held pending this Court's determination of whether and how it will intervene in the *Martinez-Ibarra* conflict.

**II. Mr. Trevino's Reply to Respondent's Brief in Opposition to His Second Question Regarding the Fifth Circuit's Extraordinary and Flawed Judicial Process Used to Address His *Brady* and Associated Ineffective Assistance Claims**

**A. The Lower Courts' Decisions to Excuse the Exhaustion Requirement for These Claims Was Correct**

Respondent's first response to Mr. Trevino's second question presented to this Court, is to reassert a procedural default argument that was rejected by both the Fifth Circuit and the District Court. *Trevino v. Thaler*, 449 Fed. Appx. 415, 423, n.5 (5th Cir, 2011); *Trevino v. Thaler*, 678 F. Supp. 2d 445, 458 (W.D. Tex., 2009). Respondent's contention is that, by filing a motion in the Texas trial court for appointment of counsel to assist with the preparation of a successive writ application, Mr. Trevino knowingly acted counter to the law in Texas regarding the process for submitting a successive state habeas application. Respondent cites to the Texas statutory scheme for capital habeas, and specifically section 5 of article 11.071 of the Texas Code of Criminal Procedure, contending that "state law does not provide for the appointment of counsel on successive state habeas application unless and until the Court of Criminal appeals finds the application meets one of the exceptions" enumerated in that section. Tex. Code Crim. P. art 11.071 §5. While it is true that section 5 does not *require* such appointment, as does section 2 of that article for an initial habeas application, it is also true that section 5 does not *prohibit* such appointment. A careful reading of section 5 will also reveal that the triggering event for all actions it specifies is the *filing* of a subsequent application for a writ of habeas corpus. There is no action triggered by any other event - including a motion for appointment of counsel. Conveniently, Respondent completely ignores the provisions of section (d)(3) of article 1.051 of the Texas Code of Criminal Procedure, which provides that a trial court may appoint counsel to represent an indigent defendant in "a habeas corpus proceeding if the court determines that the interests of justice requires representation." See Tex. Code Crim. Proc. art. 1.051 §(d)(3).

In support of his position, Respondent also cites to a decision by the Texas Court of Criminal Procedure, *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007). *Ex parte Blue* addressed a

situation in which a petitioner sentenced to death had filed a subsequent writ application in the Texas courts, contending that he could not be assessed the death penalty, consistent with this Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct 2242 (2002). One of the issues *Blue* raised, and the Court of Criminal Appeals addressed, was whether requiring *Blue's* counsel to provide the resources, *pro bono*, necessary to establish the predicate conditions applicable to an *Atkins* claim in a subsequent writ application was unreasonably onerous. The *Blue* Court concluded, as Respondent correctly cites, that the Texas legislature had determined that such a hurdle was appropriate in such a case. *Id.* at 166-67. However, that case involved a situation in which a subsequent application has already been filed. The *Blue* decision did not address either article 1.051 or the situation in which an appointment, or the approval of resources, was sought before such an application was filed.

Mr. Trevino chose to request the appointment of counsel to assist with the preparation and filing of a successive writ in state court. Contrary to Respondent's contentions, such a request is not only *not* prohibited by state law, but is specifically available if the state court determines it is required in the interest of justice. However, rather than deciding that "interest of justice" question, the applicable Texas Judge chose to take no action whatsoever on Mr. Trevino's request for an extended period of time. The District Court in turn found that such circumstances rendered the applicable state process ineffective to protect Mr. Trevino's rights pursuant to 28 U.S.C. §2254(b)(1), and thus excused Mr. Trevino's failure to exhaust state remedies. See 678 F. Supp.2d 445 at 459. The Fifth Circuit agreed with the District Court's decision. 449 Fed. Appx 415 at 423, n5. Respondent's argument in opposition to these decisions failed in the courts below, misrepresents the state of the law in Texas on this issue, and should also be summarily rejected by this Court.

**B. Respondent's Alternative Contention That The *Brady* Violation Was Not Material Because Mr. Trevino's Conviction Would Still Stand under Texas' Law of Parties Instruction, Ignores the Potential Value of the Suppressed Document in the Hands of Skilled and Talented Trial Defense Counsel**

Neither the District Court nor the Fifth Circuit decided the suppression prong of Mr. Trevino's *Brady* claim, bypassing that in favor of deciding instead that the materiality prong could not be met.<sup>1</sup> The Fifth Circuit made this decision squarely on the basis of the extraordinarily flawed judicial process it employed, and that flawed decision will be addressed separately below.

On the other hand, both the District Court and the Respondent address the materiality prong in the context of a jury charge permitting conviction of capital murder under Texas' law of parties. Significantly, the Respondent directly concedes in his reply what the District Court's opinion only implies - that Mr. Trevino was successful in establishing reasonable doubt regarding his culpability as the actor who actually committed the murder. Of course, that did not stop the state at trial from presenting an argument in favor of the death penalty at the punishment phase, that focused on placing the bloody knife in the hands of Mr. Trevino.

The thrust of the analysis by both the District Court and the Respondent is that because Mr. Trevino never denied being present at the scene of the crime, and had made some confusing puffery statements, if he didn't actually commit the murder, he clearly was guilty as a party - that is that he either acted with the intent to assist in the commission of the murder, or should have anticipated that

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<sup>1</sup> Mr. Trevino finds it disturbing that Respondent perpetuates the Fifth Circuit's blatant misreading and misquotation of the record of the hearing on state habeas review, in the discussion of the procedural posture of his *Brady* issue. Specifically, Respondent cites to and quotes the Fifth Circuit's opinion at 449 Fed. Appx. at 421, purporting to recite verbatim testimony of co-defense trial counsel Gus Wilcox at that hearing. In fact, the record of that hearing shows clearly that Mr. Wilcox not only did not testify, but that he was recognized by the habeas court as being in attendance at the hearing, and was specifically not called by either party.

a murder would take place. But an implicit assumption underlying both analyses is that Mr. Trevino's trial attorneys were unskilled in the art and science of advocacy. While Mr. Trevino does complain that his trial counsel were ineffective in their efforts to acquire appropriate evidence, he does not complain of their skills during trial of regarding the use of the evidence they did have. They were unquestionably sufficiently talented and skilled to meet the strict criteria established by Bexar County, Texas necessary to put them in that small contingent of defense attorneys qualified to represent defendants facing the death penalty at trial. The Respondent's contentions totally ignore those qualifications, and the value of such a statement to defense counsel. In the hands of such skilled and talented trial attorneys, a statement in which a third party declarant says directly that the victim decided not to have sex - whether with him alone or with a group of men is unclear and was never available for the jury's consideration - and as a direct result of that decision, *he* decided to murder her. Not that "we" decided. That "I" decided. Thus, had the *Brady* violation not occurred, defense trial counsel could have easily made the argument that it showed that had the victim agreed to willingly participate in whatever sexual activity was being demanded of her, she would not have been murdered. Whether that argument would have been persuasive or not is a question that cannot be answered at this point, because *Brady* was violated, and the statement was not available. However, under that scenario, it clearly could not have been foreseeable to Mr. Trevino that the murder would have happened, nor would Mr. Trevino's participation have been based on an intent to promote or assist another in the commission of a murder that arguable would not have occurred had the victim been cooperative. As the respondent concedes, he would not have been guilty as the primary actor. As Mr. Trevino propounds, neither would he be guilty as a party to the murder. He could well have been convicted of the offense of aggravated sexual assault - a non-death penalty

offense. But in that situation, Mr. Trevino would not be in this Court under these circumstances. This question deserves further review.

**C. Respondent's Contention That the Fifth Circuit's Extraordinary Judicial Process Used in Reviewing Mr. Trevino's *Brady* and Associated Ineffective Assistance of Counsel Claims Was "An Isolated Error Not Worthy of Certiorari Review," Is Absurd in the Context of the Review of a Death Penalty Case**

As noted in section II.B above, the Fifth Circuit denied Mr. Trevino's *Brady* claim, holding that the complained-of statement was not material. But that decision was reached as a direct result of an extraordinary judicial process that involved the Court's *sua sponte* factual investigation, record supplementation, and denial of both notice to Mr. Trevino and of an opportunity to respond. In its opinion, the Fifth Circuit noted that Mr. Trevino's opportunity to respond would be considered via a Motion for Rehearing, but - as noted in part I above - summarily denied both Mr. Trevino's Motion for Rehearing and his Motion for Rehearing *en banc*.

The process used by the Fifth Circuit with regard to this issue was indeed extraordinary. That Court conducted, *sua sponte* and in a non-transparent way, an investigative review of the trial court files of at least one of Mr. Trevino's five co-defendants. Whether the files of all co-defendants were so reviewed is unknown. The Fifth Circuit procured a copy of one document from those files, and supplemented Mr. Trevino's appellate record with that document, again *sua sponte*. Whether other documents were also procured is unknown, as is whether all trial files so reviewed by the Fifth Circuit were complete and correct.

Having thus obtained a document heretofore unknown to, or litigated by, the parties, the Fifth Circuit then took judicial notice of said document. But that judicial notice was not just notice of the existence of the document but, as seen in a moment, also necessarily of its *presumed*



credibility and reliability. The Fifth Circuit gave no notice to Mr. Trevino that it was taking such judicial notice, and thus offered him no opportunity to respond to it. It is presumed that the Fifth Circuit gave no notice, nor opportunity to respond, to Respondent as well, but that is not known. Having thus supplemented the appellate record, the Fifth Circuit proceeded with its analysis of Mr. Trevino's *Brady* and associated ineffective assistance of counsel claims. In a very short three paragraphs, the Fifth Circuit denies Mr. Trevino's *Brady* claim by concluding that "whatever probative value the [allegedly suppressed document] may have had, therefore, was negated by [the document it *sua sponte* obtained], and later by [declarant's] guilty plea." *Trevino*, 449 Fed. Appx. at 427. The Fifth Circuit never explains how a guilty plea entered by a co-defendant months after Mr. Trevino's trial has any bearing or relevance to any issue or evidence at that trial. Nor does the Fifth Circuit ever explain how it concluded that one statement was more credible and deserving of acceptance than another. Having thus easily dispatched with Mr. Trevino's *Brady* claim, the Fifth Circuit proceeds to do the same with his associated ineffective assistance of counsel claim. In one short paragraph, the Fifth Circuit holds that "[t]his claim has no merit for the reasons stated above." *Id.* at 428.

Respondent's claim that the foregoing extraordinary judicial process undertaken by the Fifth Circuit is "an isolated error not worthy of certiorari review," is absurd in the context of the review of a death penalty case. The question here is not whether an appellate court has the authority to take judicial notice of a document. Mr. Trevino does not debate that the Rule of Evidence 201 gives the Court such authority. *See* Fed. R. Evid. 201. The procedural questions at issue are the appropriateness of the independent, *sua sponte*, and non-transparent factual investigation undertaken by the Fifth Circuit; the subsequent independent, *sua sponte*, and non-transparent supplementation



of the appellate record under review, with a document that has never been even acknowledged, let alone litigated, by the parties, and; the presumption that such a document is both more credible and reliable than a contradictory statement by the same declarant, especially when that point has never been even raised, let alone argued, by Respondent in opposing Mr. Trevino's claims. Of course, there is also the question of the requirement in Rule 201(e) that "[i]f the court takes judicial notice before notifying a party, the party, on request, is still *entitled* to be heard. Fed. R. Evid. 201(e). (emphasis added).

Finally, Respondent repeatedly refers to the "brutal" or "cruel" nature of the underlying offense throughout his reply, as though that provides some justification for the ultimate penalty assessed against Mr. Trevino. This tactic was properly characterized as "the State's stereotypical fall-back argument" by the Fifth Circuit over ten years ago. See, *Gardner v. Johnson*, 247 F.3d 551, 563 (5th Cir. 2001). The logic of the *Gardner* Court's comments compel the conclusion that to permit a jury to impose the death penalty or an appellate court to uphold it based solely on the heinous or egregious nature of the offense would be to eviscerate the "special issues" scheme used in Texas capital cases, and approved as constitutional by this Court. As the *Gardner* Court noted, "if that were all that is required to offset prejudicial legal error and convert it to harmless error, habeas relief based on evidentiary error in the punishment phase would virtually never be available, so testing for it would amount to a hollow judicial act." *Id.*

In light of the serious impact of the extraordinary judicial process used by the Fifth Circuit in reviewing his *Brady* and associated ineffective assistance of counsel claims herein, Mr. Trevino is respectfully requesting that this Court take such action as appropriate pursuant to its supervisory powers, to ensure the review of the imposition of the ultimate penalty in his case not be simply a

“hollow judicial act.”

### CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Trevino respectfully requests this Court withhold action on his petition for certiorari until the question of the applicability of this Court's decision in *Martinez v. Ryan* in Texas is resolved. Alternatively, Mr. Trevino respectfully requests that his petition be granted, and that the Court either accept this case for review, or that his sentence be vacated, and his case remanded.

Respectfully submitted,

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**No. 11-10189**

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IN THE  
SUPREME COURT OF THE UNITED STATES

---

CARLOS TREVINO,

*Petitioner,*

V.

RICK THALER,

Director, Texas Department of Criminal Justice,  
Correctional Institutions Division,

*Respondent.*

---

**CERTIFICATE OF SERVICE**

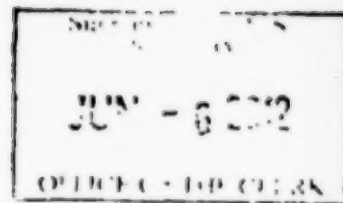
I, Warren Alan Wolf, hereby certify that on the 1st day of September, 2012, a true and correct copy of PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was served on counsel for Respondent via First Class United States Mail, addressed to Ms. Fredericka Sargent, Assistant Attorney General, Office of the Attorney General, P.O. Box 12548, Capital Station, Austin, Texas 78711, in accordance with Sup. Ct. R. 29. All parties required to be served have been served. I am a members of the Bar of this Court.

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**AMICUS  
CURIAE  
BRIEF**



No. 11-10189

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IN THE  
**Supreme Court of the United States**

---

CARLOS TREVINO,

*Petitioner.*

v.

RICK THALER,

Texas Department of Criminal Justice,  
Correctional Institutions Division.

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

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**BRIEF OF FORMER FEDERAL JUDGES AS  
AMICI CURIAE IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are a group of former federal judges who dedicated their judicial careers to promoting the rule of law and enforcing the Constitution of the United States. These former judges, listed in the attached Appendix, are interested in this case because they are gravely concerned about the Fifth Circuit's decision, and in particular the unusual and illegitimate process in arriving at that decision.

This case raises issues that go to the heart of the integrity of the federal judicial process. The Court of Appeals in this death-penalty case acted in a manner inconsistent with proper judicial procedures by going outside the record to find evidence supporting the State's argument. Moreover, the Court then improperly took upon itself the role of weighing its own evidence with the evidence in the record to find that there was no prejudice for Trevino's *Brady* claim. *Amici* believe that these errors warrant this Court's review.<sup>2</sup>

## SUMMARY OF ARGUMENT

The Fifth Circuit took on a role as both investigator and factfinder, in violation of well-

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.2.

<sup>2</sup> *Amici* address only the second question presented in the petition for certiorari, regarding Trevino's *Brady* claim, and express no opinion on the first question presented, regarding Trevino's *Wiggins* claim.

established judicial norms and in conflict with other courts. This Court should correct the Fifth Circuit's decision, which rejected a death-penalty defendant's appeal based on material outside the record, discovered by the court through its own investigation, and weighed against contrary evidence without the benefit of an actual factfinder. More generally, this Court's review is necessary to make clear that appeals courts must not enlarge their role by investigating extra-record evidence and by making a factual judgment well beyond the proper function and expertise of a federal appellate court.

*First*, there is a circuit conflict over when appeals courts can consider evidence outside the record. Seven circuits (the First, Second, Third, Fourth, Sixth, Eighth, and Ninth Circuits) seemingly always follow the usual rule that appeals courts are limited to the record in front of them. This approach is consistent with both the Federal Rules of Appellate Procedure and the traditional role of appellate courts. However, five circuit courts (the Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits) do consider extra-record evidence in particular circumstances under so-called inherent authority. Even within these five circuits, there is a conflict over whether the non-record evidence must first be evaluated by the district court (with the Eleventh Circuit holding that it must and the D.C. Circuit holding that it must except for ministerial tasks). And there is a conflict over whether the appeals court can consider non-record evidence on its own, in the absence of a party's request (with the Eleventh Circuit holding that it cannot).

Here, the Fifth Circuit committed an extreme breach of the rule against use of non-record evidence by acting as the State's investigator, searching out evidence on its own. Moreover, this evidence – the conflicting statement of an eyewitness – is the kind of evidence for which judicial notice is plainly improper. The Fifth Circuit compounded its error by failing to remand or otherwise give the parties an opportunity to be heard on the issue. The varying (and often ad hoc) approaches of the circuit courts, and the clearly erroneous approach of the Fifth Circuit here, warrant this Court's review.

*Second*, the Fifth Circuit also erred in weighing the contradictory statements to find that the withheld statement – which completely exonerated Trevino – was immaterial. There is also a dispute among the circuits on this issue, with the Ninth Circuit holding that it could not evaluate credibility in deciding *Brady* materiality, and the Sixth Circuit holding the contrary. Moreover, this Court recently held that the weighing of conflicting statements is not the proper role of the court in deciding *Brady* materiality. See *Smith v. Cain*, 132 S. Ct. 627, 630 (2012). This Court should grant the petition to resolve the issue, or, at a minimum, grant, vacate, and remand in light of *Smith*.

## ARGUMENT

### I. THE FIFTH CIRCUIT ERRED, IN CONFLICT WITH OTHER COURTS, IN INVESTIGATING AND CONSIDERING EVIDENCE OUTSIDE THE RECORD.

#### A. There is a circuit split over the use of evidence outside the record.

It is a basic tenet of judicial decisionmaking that courts will decide matters based on the record before them. This Court has reiterated this principle on many occasions. For example, this Court has held that it could not consider an argument that “appears to rest in large part on facts not part of the record before us,” reasoning that “this Court must affirm or reverse upon the case as it appears in the record.” *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986). Similarly, a written statement that was “not in the record of the proceedings below” and “not . . . considered by the trial court” cannot be “properly considered by [the Supreme Court] during the disposition of the case.” *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970). Indeed, 100 years ago, this Court stated the principle succinctly: the Court is “not at liberty to travel outside the record.” *Red C Oil Mfg. Co. v. Bd. of Agric. of N.C.*, 222 U.S. 380, 393 (1912).

The prohibition on use of extra-record evidence by this Court applies equally to the courts of appeals. There is no plausible basis for a federal appeals court to go outside the record when this Court cannot. Indeed, Rule 10 of the Federal Rules of Appellate Procedure lays out clear rules for supplementing the record with other material, and it allows supplementation only for material that “is omitted



from or misstated in the record by error or accident.” Fed. R. App. P. 10(e)(2). Moreover, “the purpose of amendment under [Rule 10(e)(2)] is to ensure that the appellate record accurately reflects the record before the District Court, not to provide this Court with new evidence not before the District Court, even if the new evidence is substantial.” *Adams v. Holland*, 330 F.3d 398, 406 (6th Cir. 2003); *see also* 16A Charles Alan Wright *et al.*, Federal Practice & Procedure § 3956.4 (“It should be noted at the outset that the . . . court should not use Rule 10(e) to insert into the record a ruling that the district court did not, in fact, make—or an item that was not, in fact, before the district court—at the time covered by the relevant portion of the record; the purpose of Rule 10(e) is to make the record accurately reflect events, not to provide an opportunity for retroactive alteration of those events.” (footnote omitted)).

Nonetheless, there is significant dispute among the circuits on the use of evidence outside the record. Five circuits – the Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits – have held that there is an inherent power to use non-record evidence in certain circumstances. None of the other seven circuits have recognized this supposed inherent power, and seemingly never allow non-record evidence unless it fits within Rule 10(e)’s narrow exception for mistaken or accidental omission.

For example, the Tenth Circuit has held that it has “an inherent equitable power to supplement the record on appeal.” *United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000). The court held that this power constituted a “rare exception to [Fed. R. App. Proc.] Rule 10(e),” *id.*, applicable where “the



interests of justice would best be served,” *id.* at 1192-93. And it exercised this “inherent authority” in *Malone v. Workman*, 282 F. App’x 686 (10th Cir. 2008), where it ruled on the merits of a habeas petition after reviewing the record in a different case. *Id.* at 688 n.2.

The D.C., Seventh, and Eleventh Circuits have also recognized the “inherent equitable power to supplement the record with information not reviewed by the district court, [though] such authority is rarely exercised.” *Shahar v. Bowers*, 120 F.3d 211, 212 (11th Cir. 1997) (en banc) (internal quotation marks omitted); *see also Brown v. Watters*, 599 F.3d 602, 604 n.1 (7th Cir. 2010) (“Although we generally decline to supplement the record on appeal with materials not before the district court, we have not applied this position categorically.”); *Colbert v. Potter*, 471 F.3d 158, 165–167 (D.C. Cir. 2006). But the ad hoc nature of when and whether to consider such evidence is evident in other Seventh Circuit cases that reject extra-record evidence out of hand. *See, e.g., United States v. Alcantar*, 83 F.3d 185, 191 (7th Cir. 1996) (“The materials Alcantar seeks to add to the record were never before the district court, and they cannot therefore be added to the record on appeal pursuant to Fed. R. App. P. 10(e).”).

However, even among these five circuits (including the Fifth), there is a split on whether the non-record evidence must first be evaluated by the district court. The Eleventh Circuit held that the party opposing introduction of the extra-record evidence must be “provided with an opportunity to rebut the evidence” on remand to the district court. *Ross v. Kemp*, 785 F.2d 1467, 1477 (11th Cir. 1986).

The D.C. Circuit agreed that “[n]ormally, supplementation of the record is effected by remanding the case to the District Court,” but held that remand was not necessary for “a ministerial task, which this court easily can perform itself.” *Colbert*, 471 F.3d at 166. The Seventh Circuit, in contrast, has considered extra-record evidence on its own. *Brown v. Watters*, 599 F.3d at 604 n.1.

The other seven circuits have not recognized any “inherent authority” to depart from Rule 10(e) of the Federal Rules of Appellate Procedure by considering evidence outside the record. Instead, they follow the basic rule that appellate courts cannot consider material outside the record and that new evidence requires a remand. *See, e.g., Leibowitz v. Cornell Univ.*, 445 F.3d 586, 592 n. 4 (2d Cir. 2006) (per curiam) (“We decline to supplement the record, however, because she has failed to satisfy Fed. R. App. P. 10(e)(2), which requires an appellant to provide evidence of an erroneous or accidental omission of material evidence in order for the record to be supplemented.”)<sup>3</sup>; *United States v. Rivera-Rosario*, 300 F.3d 1, 9 (1st Cir. 2002) (“A 10(e) motion is designed to only supplement the record on appeal so that it accurately reflects what occurred before the district court. It is not a procedure for putting additional evidence, no matter how relevant, before the court of appeals that was not before the district court.” (internal quotation marks omitted)); *Selland v.*

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<sup>3</sup> *See also Eng v. N.Y. Hosp.*, No. 98-9646, 1999 WL 980963, at \*1 (2d Cir. Sept. 30, 1999) (“Rule 10(e) is not a device for presenting evidence to this Court that was not before the trial judge.”).

*United States*, 966 F.2d 346, 347 (8th Cir. 1992) (per curiam) (“The general rule is that an appellate court will not enlarge the record to include materials not presented to the district court. ... The motion to supplement the record is denied.”); *United States v. Walker*, 601 F.2d 1051, 1054–1055 (9th Cir. 1979) (“[I]nasmuch as the affidavits were not part of the evidence presented to the district court, the Government cannot now add these documents to the record on appeal.”)<sup>4</sup>; *Salama v. Va.*, 605 F.2d 1329, 1330 (4th Cir. 1979) (“The order was never filed in the district court and for us to consider it at this stage would be facially at odds with Rule 10(e) of the Federal Rules of Appellate Procedure.” (internal quotation marks omitted)); *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 784 n.4 (3d Cir. 1978) (“It is hornbook law that this court generally cannot consider evidence which was not before the court below.” (internal quotation marks omitted)).

Indeed, two circuits have explicitly considered the possibility of such inherent authority without adopting it. The Sixth Circuit has discussed the fact that “[s]ome courts have also held that the record may be supplemented pursuant to the appellate court’s ‘equitable authority,’” but insisted that “[t]he Sixth Circuit has of yet not so held.” *United States v. Husein*, 478 F.3d 318, 336 (6th Cir. 2007). And even

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<sup>4</sup> The Ninth Circuit has suggested that it can “exercise inherent authority ... in extraordinary cases” to use extra-record evidence. *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2002). However, we are not aware of any case where the court has actually done so.

if this power did exist, “the dispositive issue would be whether the evidence sought to be added to the record in a given appeal establishes beyond doubt the proper disposition of [the pending issues].” *Id.* (alterations in original). Similarly, the Third Circuit has “entertained the possibility – but not held – that either Federal Rule of Appellate Procedure 10(e) or some inherent equitable power might afford a basis to supplement an appellate record with evidence not presented below,” and held that “such power, if we had it, certainly would not extend to a situation where, as here, a party ‘accidentally omitted’ documents from the district court record, and provides no further explanation.” *Counterman v. Warren County Correctional Facility*, 176 F. App’x 234, 239 n.1 (3d Cir. 2006) (internal citation omitted).

In sum, there is a wide disparity in how the circuits decide whether to consider evidence outside the record – seven seemingly never, or only in extreme circumstances; five seemingly based on the interests of justice or simple expedience. And even among those five, there is further disparity in that two generally require a remand to give the parties an opportunity to present or rebut the evidence in the district court. These differing, often ad hoc approaches are completely divorced from the clear language of Rule 10(e). They also undermine the integrity and fairness of the judicial process.

**B. The Fifth Circuit’s use of evidence outside the record to decide Trevino’s *Brady* claim violated Trevino’s rights and basic judicial norms.**

The Fifth Circuit departed, in a plainly erroneous manner, from the basic requirement to use only record evidence in deciding cases.



Trevino brought a *Brady* claim because the State failed to produce a second statement from Sam Rey, an eyewitness and supposed accomplice, that exonerated him.<sup>5</sup> Both parties presented their arguments to the Fifth Circuit as to the materiality of that statement. The majority then took it upon itself to bolster the State's argument, by going outside the record presented to both the district court and the court of appeals, to find a third statement from Rey that contradicted the second. As Judge Dennis explained, "[n]either the state nor Trevino had ever before mentioned Rey's [third] statement, let alone litigated the significance of it – for all we know, neither Trevino nor the state's attorneys in Trevino's criminal trial, nor the state's attorneys in Trevino's habeas proceedings, has ever seen or heard of this statement before the majority *sua sponte* obtained a copy of it after this appeal was fully briefed." Pet. App'x at A27.

The Fifth Circuit's reliance on judicial notice for its use of non-record evidence, *see* Pet. App'x at A9 n.3, does not withstand scrutiny. To begin with, judicial notice does not dispense with the usual rule

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<sup>5</sup> While the majority suggests that the statement might actually have been available to Trevino's lawyer at trial, *see* Pet. App'x at A14 n.6, the Fifth Circuit did not so hold and the district court made clear that factual disputes precluded any finding on the issue. Pet. App'x at B25 ("More specifically, there appears to be a genuine issue of material fact regarding whether petitioner's accomplice Rey's statement, which indicated Cervantes admitted to Rey that he stabbed Salinas, was ever made available to petitioner's trial counsel."). Indeed, "[t]he state does not even contend that it disclosed Rey's second statement." Pet. App'x at A46 (Dennis, J., dissenting).

that appeals courts should not consider evidence that was not presented to the district court in the first instance. See *First Nat'l Bank of Wellington v. Chapman*, 173 U.S. 205, 217 (1899) ("The case does not show that the trial court received the report in evidence, and nothing in any finding has reference in any way to that report. We do not think it is a document of which we can take judicial notice, or that we could refer to any statement or alleged fact contained therein, unless such fact were embraced in the finding of facts of the trial court, upon which we must decide this case."); see also, e.g., *U.S. ex rel. Wilkins v. United Health Group*, 659 F.3d 295, 303 (3d Cir. 2011) ("ordinarily a court of appeals should not take judicial notice of documents on an appeal which were available before the district court decided the case but nevertheless were not tendered to that court"); *Zell v. Jacoby-Bender, Inc.*, 542 F.2d 34, 38 (7th Cir. 1976) (refusing to take judicial notice where it would violate the rule that appeals court must consider only evidence before the trial court); *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 386 n.1 (9th Cir. 2010) (same); *Molnar v. Care House*, 359 F. App'x 623, 625 (6th Cir. 2009) (same); *Matthews v. Marsh*, 755 F.2d 182, 183-84 (1st Cir. 1985) (same); *Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 12 n. 5 (D.C. Cir. 1980) (same). The Fifth Circuit's contrary opinion would make judicial notice so broad that it would effectively swallow the rule against use of non-record evidence.

Furthermore, judicial notice is permitted *only* for "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy

cannot reasonably be questioned." Fed. R. Evid. 201(b). Obviously, the third Rey statement is not "generally known." Also, the source of the statement is not so certain that "its accuracy cannot reasonably be questioned." As Judge Dennis outlined, there are many questionable facts upon which the majority's judicial notice relies: (1) "that Rey made a third written statement [and] that he made it before Trevino's trial"; (2) "that the prosecutors in Trevino's case were aware of the existence of that written statement at the time of Trevino's trial"; and (3) "that the prosecutors in Trevino's trial would have used that statement if defense counsel had called Rey as a witness or used his second written statement to attack the state's case; and that the jury would have given credit to Rey's third written statement in lieu of his second written statement." Pet. App'x at A36.

Taking these in order, first, the fact that the statement appears in the record of another case does not establish that the statement was actually admitted or the timing of the statement. Simply put, the presence of a statement in a court record is not indisputable proof of the truth of that statement.<sup>6</sup> Second, if the prosecutors did not know of the third statement, then it is irrelevant to materiality because the third statement would not have been used to

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<sup>6</sup> While courts do often take judicial notice of court records, they use the records to establish the fact that the record exists, not the truth of the record itself. See 21B Charles Alan Wright & Kenneth W. Graham, *Federal Practice & Procedure: Evidence* 2d § 5106.4 ("It seems clear that a court cannot notice pleadings or testimony as true simply because these statements are filed with the court.") (citing numerous cases).



rebut the second. And there is no evidence that the prosecutor in Trevino's case knew of the third statement at the time of Trevino's trial. Indeed, the process here shows that the contrary is almost certainly true: "It certainly stands to reason that if the state's attorneys in Trevino's case had been aware of this statement, as the majority's argument presupposes, then they would have relied upon it in responding to Trevino's habeas petition; but they did not." Pet. App'x at A35 (Dennis, J., dissenting). Third, there is considerable uncertainty as to whether the third statement would have come into evidence and how the jury would have viewed the conflicting statement. The Fifth Circuit had no way of knowing the circumstances under which the third statement was made, how Rey might have testified at Trevino's trial, how the prosecutor would have used the third statement (if at all), and how the defense attorney would have countered the third statement. In sum, this kind of evidence is not the proper subject of judicial notice for good reason: courts cannot determine its veracity and import without further admissible evidence and argument.

In addition, the Fifth Circuit's approach was particularly erroneous because it investigated the extra-record evidence on its own accord. Even those courts that do (on rare occasions) consider evidence outside the record almost never do so by investigating the outside evidence on their own. *See, e.g., Jones v. White*, 992 F.2d 1548, 1566-67 (11th Cir. 1993) (explaining that, although "[t]his court's inherent equitable powers allow it to supplement the record with information not reviewed by the district court," it "[has] not allowed supplementation when a party has failed to request leave of this [c]ourt to

supplement a record on appeal"). The role of the court, and particularly the appellate court, is not to investigate, but to decide based on the evidence presented by the parties. Here, the court adopted a prosecutorial role in investigating facts that would supposedly prove Trevino's guilt by rebutting the withheld statement. The third statement "was not part of the record before the district court, as the majority acknowledges, nor was it ever once mentioned by the parties below or on appeal." Pet. App'x at A34 (Dennis, J., dissenting) (internal citation omitted). Thus, the court had to search on its own for the third statement in an effort to bolster the State's argument. Did the court also look for a possible fourth statement? Did it investigate whether the prosecution wrongly withheld other evidence from the defense? If it had, the State would be justifiably outraged, and the outrage is no less here because the court acted as an advocate of the State.

Finally, and in all events, the Fifth Circuit erred in refusing to remand to the district court or allow reargument. "On timely request, a party is to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice of a fact before notifying a party, the party, on request, is still entitled to be heard." Fed. R. Evid. 201(e). The Fifth Circuit attempted to evade this requirement by allowing Trevino to "raise any objection he may have by means of a petition for rehearing." Pet. App'x at A9 n.3. Of course, Trevino could have filed a rehearing petition without the court's invitation. More importantly, a petition for rehearing does not substitute for an actual hearing and decision. *See id.* at 37 (the majority has "put the

parties in the untenable position of litigating an issue of fact in a petition for rehearing in an appellate court”) (Dennis, J., dissenting). And it certainly failed to do so here because the court did not grant the petition or even request argument from the State. Indeed, under the Fifth Circuit’s logic, there is never a problem under Rule 201(e) – or any time the court decides based on an issue the parties did not have an opportunity to argue – simply because a party can always file a petition for rehearing. But such a makeshift approach makes a mockery of the judicial process.

## **II. THE FIFTH CIRCUIT ERRED, IN CONFLICT WITH OTHER COURTS, IN WEIGHING CREDIBILITY IN DECIDING *BRADY* MATERIALITY.**

The Fifth Circuit erred in weighing credibility to come to the conclusion that a statement of an eyewitness exonerating the defendant is not “material.” This Court has held that “evidence is ‘material’ within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Smith*, 132 S. Ct. at 630 (internal quotation marks omitted). In *Smith*, the State failed to disclose statements from an eyewitness contradicting his inculpatory testimony. *Id.* at 629-30. While “[t]he State . . . advance[d] various reasons why the jury might have discounted [the witness’s] undisclosed statements . . . [t]hat merely leaves us to speculate about which of [the witness’s] contradictory declarations the jury would have believed.” *Id.* at 630.

The Fifth Circuit engaged in precisely the kind of speculation that this Court disapproved in *Smith*.

Here, as in *Smith*, there were contradictory statements from a key eyewitness.<sup>7</sup> And the Fifth Circuit weighed the credibility of the two statements to decide that “[i]ntroduction of Rey’s third statement would have destroyed any benefit Trevino would have otherwise gained from the second statement.” Pet. App’x at A15. This conclusion that the third statement was somehow more credible than the second – and that the jury would have felt the same way – is improper for any court (let alone an appeals court) in deciding *Brady* materiality. As Judge Dennis accurately put it:

I do not share the majority’s confidence in their ability as appellate judges with nothing but a paper record to neatly reconstruct the likely outcome of this case had all of Rey’s statements been disclosed to defense counsel before trial, since Rey’s third statement, upon which the majority so heavily relies in affirming the death penalty, has never been introduced or subjected to any trial court adversary proceedings in this case.

Pet. App’x at A28.<sup>8</sup>

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<sup>7</sup> To be sure, in *Smith*, the witness’s testimony was the only evidence linking the defendant to the crime. However, regardless of the possible impact of other evidence in Trevino’s case, *Smith*’s holding clearly precludes what the Fifth Circuit did here: concluding that one statement was not material simply because there was also a conflicting statement.

<sup>8</sup> See also Pet. App’x at A34 (Dennis, J., dissenting) (“[E]ven assuming *arguendo* that we could take judicial notice of Rey’s third statement, it would not necessarily prevent the defense

Indeed, there are serious questions about the reliability of Rey's third statement. There is no evidence about the circumstances of its creation and it has not been tested by cross-examination. There also has been no opportunity for Trevino's counsel to inquire about its creation or test its reliability. In short, there is no basis on which to deem Rey's third statement reliable – let alone so reliable that it would make the second statement immaterial.

Before this Court decided *Smith*, other circuits were divided over whether they could assess the credibility of conflicting statements in deciding *Brady* materiality. For example, in *Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010), the Ninth Circuit evaluated whether the names of two potential witnesses whose names were withheld from the defendant were material evidence. *Id.* at 1266. The district court held that the witnesses were “presumptively not credible on the basis of inconsistencies in their declarations.” *Id.* The Ninth Circuit reversed, and held that an evidentiary hearing was necessary to determine the credibility of the witnesses because inconsistencies in the declarations alone did not conclusively show that the evidence was not material. *Id.*

On the other hand, the Sixth Circuit reached a different conclusion in a similar case. In *Benge v.*

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(continued...)

counsel in a hypothetical retrial from effectively using Rey's second statement as tending to exculpate Trevino and challenge the credibility of the state's witnesses against him in the guilt and penalty phases of his capital murder trial.”).



*Johnson*, 474 F.3d 236 (6th Cir. 2007), a witness's favorable, undisclosed statement conflicted with a different statement of the same witness. *Id.* at 243. The court concluded that the evidence was not material under *Brady* because, had it been introduced, the witness's contrary statement "could have been used to impeach his new version of the events," and thus there was "no reasonable probability" that the result would have been different had the evidence been introduced. *Id.*

Given the circuit conflict, and the clear inconsistency between *Smith* and the Fifth Circuit's opinion, this Court should grant certiorari to resolve the issue. At a minimum, the *amici* ask this Court to grant the petition, and vacate and remand for the Fifth Circuit to consider *Smith*.

## CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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## **APPENDIX**

**APPENDIX**

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Hon. Shirley M. Hufstedler, Former Judge, United States Court of Appeals for the Ninth Circuit (1968-79)

Hon. Nathaniel R. Jones, Former Judge, United States Court of Appeals for the Sixth Circuit (1979-2002)

Hon. H. Lee Sarokin, Former Judge, United States Court of Appeals for the Third Circuit (1994-96); Former Judge, United States District Court for the District of New Jersey (1979-94)

Hon. Timothy K. Lewis, Former Judge, United States Court of Appeals for the Third Circuit (1992-99); Former Judge, United States District Court for the Western District of Pennsylvania (1991-92)

Hon. Thomas D. Lambros, Former Judge, United States District Court, Northern District of Ohio (1967-95) (Chief Judge, 1990-95)

Hon. Alfred Wolin, Former Judge, United States District Court for the District of New Jersey (1987-2004)

Hon. William G. Bassler, Former Judge, United States District Court for the District of New Jersey (1991-2006)

**Hon. Stephen M. Orlofsky, Former Judge, United States District Court for the District of New Jersey (1995-2003); Former Magistrate Judge, United States District Court for the District of New Jersey (1976-80)**

# **JOINT APPENDIX**

IN THE  
**Supreme Court of the United States**

---

CARLOS TREVINO,

*Petitioner,*

*v.*

RICK THALER, DIRECTOR, TEXAS DEPARTMENT  
OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS  
DIVISION,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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JOINT APPENDIX VOLUME I OF II  
JA1-193

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Docket Entries for Trial, *State v. Trevino*,  
No. 97-cr-1717D**

## DATE OF ENTRY

## COURT ENTRIES

\* \* \*

6/19/97            9:15 Trial begins. Jury sworn. Indictment read. Deft pleads not guilty. 9:22 State makes opening statement. Defense reserves the right to open later. \* \* \*

\* \* \*

7/1/97            \* \* \* Rest. Rest. Close to close. 11:05 Charge read. 11:30 State opens. 11:58 Defense argues. 12:43 State closes. 1:00 Jury out. 5:15 Jury returns.

7/01/97            Verdict in open court. Guilty of capital murder. Jury polled. All agree.

7/02/97            9:07 Ralph Looney. Lorraine Reagan. Dario Gonzales. Maria Teresa Espinosa. Nelson Atwell. Riojas (John). Officer Aleman. Juan Gonzales. Bob Morrill. Juanita de Leon. Rest & close by all.

7/03/97            9:15 Charge read to jury. 9:27 State argues. 9:45 Defense argues. 10:15 State closes. 10:22 Jury retires to deliberate. 5:25 Jury returns verdict in open court. Special issue #1 Yes. Special issue #2 Yes. Special issue #3 No. DEATH PENALTY.

\* \* \*

JUL 11 1997        Carlos Trevino in court. Wants lawyer appointed on writ. Determined he was indigent.



**Texas Court of Criminal Appeals, Docket Entries  
for Direct Appeal, *Trevino v. State*,  
No. AP-72,851**

| DATE      | EVENT TYPE                                                                                     |
|-----------|------------------------------------------------------------------------------------------------|
| 9/2/1997  | DP BEGIN<br>* * *                                                                              |
| 1/19/1998 | APPT COUNSEL/ORDER, Description: Habeas Corpus—Capital Death,<br>Disposition: granted<br>* * * |
| 3/5/1998  | Reporters Record FILED<br>* * *                                                                |
| 5/12/1999 | OPINION ISSD, Disposition: Affirmed, Opinion Written: Yes<br>* * *                             |
| 6/7/1999  | MANDATE ISSD<br>* * *                                                                          |

**290th Judicial District Court of Bexar County, Texas,  
Bexar County Criminal Justice  
Information System Event Log Display,  
No. 97-cr-1717D**

\* \* \* Juris Court: D290 Case Nbr: 1997CR1717D

\* \* \* Name: TREVINO, CARLOS \* \* \*

|           | Date     | Description * * *                          |
|-----------|----------|--------------------------------------------|
|           |          | * * *                                      |
| 157 * * * | 07111997 | ATTORNEY APPOINTED<br>* * * (APPEAL) * * * |
|           |          | * * *                                      |
| 228 * * * | 04191999 | POST CONVICT WRIT<br>* * *                 |
|           |          | * * *                                      |
| 249 * * * | 07102000 | HEARING DATE SET<br>* * *                  |
|           |          | * * *                                      |
| 259 * * * | 12062000 | WRIT ORDER * * *                           |
|           |          | * * *                                      |
| 286 * * * | 08182004 | POST CONVICT WRIT<br>* * *                 |
|           |          | * * *                                      |
| 296 * * * | 09272005 | WRIT ORDER * * *                           |
|           |          | * * *                                      |

**Texas Court of Criminal Appeals, Docket Entries  
for First State Habeas Proceeding,  
*Ex parte Trevino*, No. WR-48,153-01**

| DATE       | EVENT TYPE                                                                                                                    |
|------------|-------------------------------------------------------------------------------------------------------------------------------|
| 12/29/2000 | 11.071 WRIT RECD, Description: Habeas Corpus—Capital Death<br>* * *                                                           |
| 4/4/2001   | 11.071 WRIT DISP, Description: Habeas Corpus—Capital Death, Disposition: HC relief denied with written order/opinion<br>* * * |

**Texas Court of Criminal Appeals, Docket Entries  
for Second State Habeas Proceeding,  
*Ex parte Trevino*, No. WR-48,153-02**

| DATE       | EVENT TYPE                                                                                                                  |
|------------|-----------------------------------------------------------------------------------------------------------------------------|
| 9/29/2005  | 11.071 WRIT RECD, Description: Habeas Corpus—Capital Death                                                                  |
| 11/23/2005 | 11.071 WRIT DISP, Description: Habeas Corpus—Capital Death, Disposition: Dismissed with written order, Opinion Written: Yes |

\* \* \*

**United States District Court  
Western District of Texas, Docket Entries  
for Federal Habeas Proceeding,  
*Trevino v. Dretke*, No. 01-cv-306**

| DATE FILED | #  | DOCKET TEXT                                                                                                                                                       |
|------------|----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 04/12/2001 | 1  | Motion by Carlos Trevino for ap-<br>pointment of counsel * * *<br>* * *                                                                                           |
| 04/13/2001 | 2  | Order granting motion for ap-<br>pointment of counsel [1-1] such<br>that attorney Albert Rodriguez is<br>appointed as counsel from peti-<br>tioner * * *<br>* * * |
| 03/14/2002 | 10 | Petition by Carlos Trevino for writ<br>of habeas corpus * * *<br>* * *                                                                                            |
| 07/31/2002 | 16 | Motion by Carlos Trevino for Al-<br>bert L. Rodriguez to withdraw as<br>attorney * * *                                                                            |
| 08/14/2002 | 17 | Order granting motion for Albert<br>L. Rodriguez to withdraw as at-<br>torney * * *                                                                               |
| 08/19/2002 | 18 | Pro Se Motion by Carlos Trevino<br>for appointment of counsel * * *<br>* * *                                                                                      |
| 08/22/2002 | 20 | Motion by Carlos Trevino for ap-<br>pointment of additional counsel<br>* * *                                                                                      |

| DATE FILED | #  | DOCKET TEXT                                                                                                                                                           |
|------------|----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 09/03/2002 | 21 | Order granting motion for appointment of additional counsel<br>* * *<br>* * *                                                                                         |
| 01/12/2004 | 30 | Motion by Carlos Trevino for authorization of appointment of, and funds for expert assistance, and statement of the need for confidentiality * * *<br>* * *           |
| 01/15/2004 | 32 | SEALED Order * * * granting motion for authorization of appointment of, and funds for expert assistance, and statement of the need for confidentiality * * *<br>* * * |
| 06/10/2004 | 36 | Unopposed Motion by Carlos Trevino to stay proceedings and hold them in abeyance * * *                                                                                |
| 06/15/2004 | 37 | Order granting motion to stay proceedings and hold them in abeyance * * *<br>* * *                                                                                    |
| 03/28/2006 | 49 | Motion by Carlos Trevino to stay proceedings and hold them in abeyance * * *<br>* * *                                                                                 |

| DATE FILED | #  | DOCKET TEXT                                                                                                       |
|------------|----|-------------------------------------------------------------------------------------------------------------------|
| 08/02/2006 | 54 | ORDER granting 49 Motion to Stay, granting 49 Motion to Hold Case in Abeyance. * * *<br>* * *                     |
| 10/02/2008 | 62 | ORDER LIFTING STAY AND SETTING DEADLINES. * * *                                                                   |
| 11/03/2008 | 63 | * MOTION to Appoint Expert <i>MOTION FOR APPOINTMENT OF INVESTIGATOR</i> by Carlos Trevino. * * *                 |
| 11/04/2008 | 64 | * MOTION to Appoint Counsel <i>Motion for Appointment of Additional Counsel</i> by Carlos Trevino. * * *<br>* * * |
| 11/07/2008 | 66 | * MOTION for Discovery by Carlos Trevino. * * *<br>* * *                                                          |
| 11/14/2008 | 69 | ORDER, ORDER REASSIGNING CASE. Case reassigned to Judge Xavier Rodriguez for all proceedings. * * *<br>* * *      |
| 12/08/2008 | 76 | Petition for Writ of Habeas Corpus, filed by Carlos Trevino. * * *<br>* * *                                       |



| DATE FILED | #  | DOCKET TEXT                                                                                                                                          |
|------------|----|------------------------------------------------------------------------------------------------------------------------------------------------------|
| 12/21/2009 | 87 | MEMORANDUM OPINION<br>AND ORDER—ORDERED that<br>all federal habeas corpus relief re-<br>quested in petitioner's amended<br>petition is DENIED. * * * |
| 12/21/2009 | 88 | CLERK'S JUDGMENT * * *<br>* * *                                                                                                                      |
| 02/23/2010 | 95 | NOTICE OF APPEAL by Carlos<br>Trevino * * *<br>* * *                                                                                                 |

**United States Court of Appeals for the Fifth Circuit,  
Docket Entries for Federal Habeas Appeal,  
*Trevino v. Thaler*, No. 10-70004**

02/25/2010 DEATH PENALTY CASE docketed.  
NOA filed by Appellant Mr. Carlos  
Trevino \* \* \*

\* \* \*

07/21/2010 APPELLANT'S BRIEF FILED by Mr.  
Carlos Trevino. \* \* \*

\* \* \*

09/17/2010 APPELLEE'S BRIEF FILED by Ap-  
pellee Mr. Rick Thaler, Director, Texas  
Department of Criminal Justice, Correc-  
tional Institutions Division \* \* \*

\* \* \*

10/18/2010 APPELLANT'S REPLY BRIEF  
FILED by Mr. Carlos Trevino \* \* \*

\* \* \*

11/14/2011 UNPUBLISHED OPINION ORDER  
FILED. [10-70004 Affirmed] (ISSUED  
AS AND FOR THE MANDATE) Judge:  
WED, Judge: JES, Judge: JLD; denying  
motion for additional COA issues filed by  
Appellant Mr. Carlos Trevino) \* \* \*

11/14/2011 MANDATE ISSUED. \* \* \*

\* \* \*

01/12/2012 PETITION filed by Appellant Mr. Carlos  
Trevino *Corrected Petition* for rehearing  
\* \* \*

01/12/2012 PETITION filed by Appellant Mr. Carlos Trevino for rehearing en banc \* \* \*.

\* \* \*

01/31/2012 COURT ORDER denying petition for rehearing en banc filed by Appellant Mr. Carlos Trevino \* \* \* Without Poll.  
\* \* \*

\* \* \*

IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS, EN BANC

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No. AP-72,851

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CARLOS TREVINO,

*Appellant,*

*v.*

STATE OF TEXAS

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May 12, 1999

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[991 S.W.2d 849]

\* \* \*

[850]

**OPINION**

KELLER, J. delivered the opinion of the Court, in which McCORMICK, P.J., and MANSFIELD, PRICE, HOLLAND, WOMACK, and KEASLER joined.

Appellant was convicted and sentenced to death for a capital murder committed in [851] June 1996. Tex. Penal Code § 19.03 and TEX. CODE CRIM. PROC. Art. 37.071.<sup>1</sup> Appeal is automatic to this Court. TEX. CONST. Art. I, § 5; Art. 37.071. Appellant raises nineteen points of error. We will affirm.

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<sup>1</sup> Unless otherwise indicated, references to articles will be to the Texas Code of Criminal Procedure.

In his first point of error, appellant argues the trial court erred in denying his motion for mistrial. Near the conclusion of jury selection, the State informed appellant of its discovery and intent to use incriminating DNA evidence. Appellant moved the trial court for mistrial on grounds that because of the state's tardy disclosure, he had lost the opportunity to examine the venire regarding DNA evidence and thereby had lost the intelligent use of his peremptory strikes. Appellant alleged that prior to jury selection, he had requested notice of all scientific evidence which the State anticipated introducing and had formulated his jury selection strategy on the State's representations, including the representation that they had not discovered any incriminating DNA evidence. Appellant's motion for mistrial was denied.

The State asserts that before jury selection, it had informed appellant that though they had not discovered any incriminating DNA evidence, DNA testing was being conducted and that results had at that point not been prejudicial. But according to the State, it also informed appellant that it was conducting further testing on an article of the victim's clothing. That appellant had this information is confirmed by his own arguments when he moved for mistrial. Citing *Smith v. State*, 676 S.W.2d 379 (Tex. Crim. App. 1984), the State asserts that under these facts it is clear that appellant's decision not to examine the venire regarding DNA evidence was a strategic choice.

Appellant frames his claim in terms of proper questions not allowed, but in fact no such questions were propounded. Therefore, we cannot accept this categorization of this issue. We must instead review the question as what in fact it was, i.e., a denial of a motion for mistrial. The denial of a motion of mistrial is re-

viewed under an abuse of discretion standard. *State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex. Crim. App. 1993).

In presenting his claim to the trial court, appellant's counsel admitted that the State had informed him before jury selection of its continuing DNA tests on the victim's clothing. Counsel admitted that since none of the DNA testing had been incriminating, he decided to "let it go." *Id.* Counsel's decision not to query the venire regarding DNA evidence was a strategic decision and the product of neither prosecutorial misconduct nor trial court error. Under these facts, we cannot hold that the trial court abused its discretion in denying appellant's motion. Appellant's first point of error is overruled.

In his second point appellant argues that the evidence was insufficient to corroborate accomplice witness testimony. Art. 38.14.<sup>2</sup> "The accomplice witness rule is satisfied if there is *some* non-accomplice evidence which *tends* to connect the accused to the commission of the offense alleged in the indictment." *Hernandez v. State*, 939 S.W.2d 173, 176 (Tex. Crim. App. 1997) (emphasis in original). The non-accomplice evidence need not itself be sufficient to establish the accused's guilt beyond a reasonable doubt. *Id.* And, while the accused's mere presence at the scene of the crime is insufficient, by itself, to corroborate accomplice witness testimony, "evidence of such presence, coupled

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<sup>2</sup> Article 38.14 states:

A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

with other suspicious circumstances, may [852] tend to connect the accused to the offense.” *Dowthitt v. State*, 931 S.W.2d 244, 249 (Tex. Crim. App. 1996).

In his brief, appellant lists the evidence connecting him to the crime: (1) DNA evidence that did not exclude appellant as the source of a blood stain on the victim’s panties, (2) appellant’s fingerprints in the vehicle used to transport the victim to Espada Park, and (3) fiber evidence from appellant’s pants found on the victim’s clothes. While appellant concedes that this evidence connected him to the crime scene, he contends that there was no evidence that connected him to the murder or sexual assault of the victim. We disagree. While the fingerprint evidence may have merely established appellant’s presence at the crime scene, the presence of appellant’s blood<sup>3</sup> on the victim’s panties and appellant’s pant fibers on the victim’s clothes tends to connect him to the crime itself. The logical inference from these two items of evidence is that appellant had intimate contact with the victim and may have suffered defensive wounds. In other contexts, we have observed that the presence of blood, linked in some way to the defendant, was some evidence tending to connect the defendant to the offense. *Dowthitt*, 931 S.W.2d at 244 (beer bottle with defendant’s fingerprint and victim’s blood on it); *Gosch v. State*, 829 S.W.2d 775, 781 (Tex. Crim. App. 1991), *cert. denied*, 509 U.S. 922, 113 S. Ct. 3035, 125 L. Ed. 2d 722 (1993) (blood of victim’s blood type found on the defendant’s blue jeans). Al-

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<sup>3</sup> The statistical analysis established that roughly only one in every 10,767 members of the southwestern Hispanic population has the particular DNA type found along with the victim’s DNA on the panties.



though these cases involved finding the *victim's* blood on items belonging to the defendant, the connection is equally obvious when the *defendant's* blood is found on items belonging to the victim. While appellant observes that there were no semen deposits by him on the victim and that no non-accomplice evidence connected him to the murder weapon, the absence of such "smoking gun" evidence does not somehow invalidate the evidence that does connect him to the offense. The combination of the three items listed above is more than sufficient to tend to connect appellant to the offense. As we have previously held, "[e]ven apparently insignificant incriminating circumstances may sometimes afford satisfactory evidence of corroboration." *Dowthitt*, 931 S.W.2d at 249 (citing *Munoz v. State*, 853 S.W.2d 558, 559 (Tex. Crim. App. 1993)). Such is the case here. Appellant's second point of error is over-ruled.

In his third, fourth and fifth points of error, appellant argues that the trial court erred in admitting various hearsay assertions made by Juan Gonzales. Specifically, appellant complains of Gonzales' assertion that when he told appellant that the police wanted to talk to him, appellant told him not to say anything to the police. This is the subject of appellant's third point of error. Gonzales also said that as the conspirators drove away from the scene of the crime, Santos Cervantes commented to appellant that it was cool how he (appellant) had snapped her neck and used the knife. This is the subject of appellant's fourth point of error. Gonzales said further that appellant responded to Cervantes' comment with the statement "I learned how to kill peo-

ple in prison.”<sup>4</sup> This is the subject of appellant’s fifth point of error. We will address appellant’s own statements first as they raise a different legal issue.

Appellant argues that his own alleged statements were rank hearsay, not admissible under any hearsay exception. Tex. R. Evid. 801 *et seq.*<sup>5</sup> The State responds that appellant’s statements were not hearsay but admissions by a party-opponent. Tex. R. Evid. 801(e)(2). The State correctly argues that Rule 801(e)(2)(A) plainly and unequivocally states that a criminal defendant’s own statements, when being offered against him, are not hearsay. *See also Drone v. State*, 906 S.W.2d 608, 611 (Tex. App.—Austin 1995, pet. ref’d); *Cunningham v. State*, 846 S.W.2d 147 (Tex. App.—Austin 1993) *aff’d on other grounds*, 877 S.W.2d 310 (Tex. Crim. App. 1994). This rule recognizes that the out-of-court statements of a party differ from the out-of-court statements of non-parties, and raise different evidentiary concerns. *See Bingham v. State*, 987 S.W.2d 54, at 56-57 (Tex. Crim. App. 1999); *Bell v. State*, 877 S.W.2d 21, 25 (Tex. App.—Dallas 1994, pet. ref’d). A party’s own statements are not hearsay and they are admissible on the logic that a party is estopped from challenging the fundamental reliability or trustworthiness of his own statements. *Id.* 2 STEVEN

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<sup>4</sup> The prepositional phrase “in prison” was deleted from Gonzales’ testimony during the guilt/innocence phase of trial but reintroduced during the punishment phase of trial.

<sup>5</sup> That the trial court treated the statements as hearsay and ruled that they were exceptions to hearsay is not pertinent to our resolution of the issue, as the trial court’s decision will be upheld if it is correct on any theory of law applicable to the case. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

GOODE, OLIN GUY WELLBORN III & M. MICHAEL SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 801.7 (Texas Practice 1993). Though our cases have sometimes failed to recognize this aspect of a party's own statement, we here disavow any precedent indicating that the statement of a party, when being offered against him, is hearsay. *E.g.*, *Green v. State*, 840 S.W.2d 394, 411-412 (Tex. Crim. App. 1992); *Bryan v. State*, 837 S.W.2d 637 (Tex. Crim. App. 1992) and compare *Davis v. State*, 961 S.W.2d 156, 161 (Tex. Crim. App. 1998) (Womack J. concurring); *Banks v. State*, 643 S.W.2d 129, 134 (Tex. Crim. App. 1982). And we note that party admissions, unlike statements against interest, need not be against the interests of the party when made; in order to be admissible, the admission need only be offered as evidence against the party.

Accordingly, we agree with the State that Juan Gonzales' testimony that appellant told him not to say anything to police and that appellant received his co-conspirator's compliments with the assertion that he had learned to kill in prison, were admissible under Rule 801(e)(2)(A) as the admissions of a party. Appellant's third and fifth points of error are overruled.

Cervantes' statement is also admissible under Rule 801(e)(2). Cervantes' assertion apparently meant that appellant had snapped the victim's neck. Because appellant indicated his agreement with the assertion that he learned to kill in prison, Cervantes' statement is not hearsay but an adopted admission, admissible under Rule 801(e)(2)(B). *Cantu v. State*, 939 S.W.2d 627, 635

(Tex. Crim. App. 1997). Appellant's fourth point of error is overruled.<sup>6</sup>

In his sixth point of error, appellant challenges the sufficiency of the evidence to sustain an affirmative answer to the second special issue, i.e., "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Article 37.071 § 2(b)(1). The State argues that the heinous facts of this case alone suffice to establish appellant's dangerousness and, alternatively, that the evidence introduced at punishment was sufficient to establish future dangerousness beyond a reasonable doubt.

In reviewing the sufficiency of the evidence on this issue we ask whether, in the light most favorable to the verdict, any rational trier of fact could have found beyond a reasonable doubt that there is a probability that appellant would commit criminal acts of violence constituting a con- [854] tinuing threat to society. *Chambers v. State*, 866 S.W.2d 9, 16 (Tex. Crim. App. 1993). In this light, the evidence establishes that after a history of crime, albeit non-violent, appellant was sentenced to six years in prison and was paroled from this sentence on May 10, 1996. While in prison he had been placed on administrative segregation for his involvement in a violent racist prison gang, Los Pistoleros Latinos. On June 10, 1996, only one month after being paroled, appellant and four others picked up a fifteen-year-old girl at a convenience store, took her to an isolated park,

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<sup>6</sup> Cervantes' statements could have been asserting that he himself had snapped the victim's neck. If this is so then it was a statement against interest admissible under Rule 803(24). *Cantu*, 939 S.W.2d at 635.

brutally gang raped her—in the course of the offense, appellant encouraged his fifteen-year-old cousin to join in, but the cousin refused—and then appellant cut the victim's throat, so as to not leave witnesses. Cervantes complimented appellant on his use of a knife, and appellant asserted "he had learned how to kill people in prison."

We have previously held that a finding of future dangerousness can be supported by evidence showing "an escalating pattern of disrespect for the law." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). In *King*, prior to the capital murder for which he was on trial, the defendant had committed burglary while on parole from theft charges. *Id.* We found that such an escalation of crimes established an escalating pattern of disrespect for the law from which a rational jury could draw an inference of future dangerousness. *Id.* While in *King* we did not specifically attribute significance to the fact that the burglary was committed while King was on parole, we find that the jury could have considered as evidence of future dangerousness the fact that appellant was on parole when he committed this crime.

Moreover, a jury can rationally infer future dangerousness from the brutality of the offense. *Sonnier v. State*, 913 S.W.2d 511, 517 (Tex. Crim. App. 1995). We have in the past found the circumstances surrounding the crime to be "horrendous" when the crime was a gang rape and murder of two girls. *Cantu v. State*, 939 S.W.2d 627, 642 (Tex. Crim. App.), cert. denied, \_\_ U.S. \_\_, 522 U.S. 994, 118 S. Ct. 557, 139 L. Ed. 2d 399 (1997). The gang rape and throat-cutting murder of the fifteen-year-old girl in this case also strikes us as being a particularly brutal crime, evidencing "a most dangerous aberration of character" supporting a jury's affirmative



finding of future dangerousness. See *Sonnier*, 913 S.W.2d at 517.

Finally, future dangerousness can be inferred from evidence showing a lack of remorse and/or indicating an expressed willingness to engage in future violent acts. *Rachal v. State*, 917 S.W.2d 799, 806 (Tex.Crim.App.), cert. denied, 519 U.S. 1043, 117 S. Ct. 614, 136 L. Ed. 2d 539 (1996). Appellant's statement after the murder that he "learned to kill in prison" indicates at least an initial lack of remorse for the killing and also that he was prepared to kill in the future. Moreover, rather than dissuade his younger cousin from the life of crime he had chosen for himself, appellant attempted to bring him into that world of crime. We conclude that there was sufficient evidence from which a rational jury could conclude that appellant would probably commit future acts of violence that would constitute a continuing threat to society. Appellant's sixth point of error is overruled.

Appellant's seventh and eighth points of error voice his contentions that the trial court erred in admitting into evidence the oath of Los Pistoleros Latinos, a document which outlines the racial qualifications and the goals and obligations of gang members. The document was introduced at punishment to educate the jury on the nature of appellant's gang association. Appellant argues in point seven that the document was irrelevant and more prejudicial than probative. Tex. R. Evid. 402 & 403. And in point eight appellant argues the admission of this evidence violated his right to due process. The State responds that appellant's arguments on [855] appeal do not comport with his objection at trial. The record supports the State.

At trial appellant objected only on grounds that the proper predicate had not been laid for the testimony. When that objection was sustained and the State laid its predicate, appellant renewed his objection "on the same grounds" but never argued that the evidence was irrelevant, prejudicial or in violation of due process. On these facts we must agree with the State that appellant's arguments have not been preserved for review. *E.g., Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991) (to preserve an issue for appellate review, the point of error must at least minimally comport with the objection at trial). Appellant's seventh and eighth points of error are overruled.

In points nine through nineteen appellant challenges the constitutionality of the Texas death scheme on grounds which have been repeatedly rejected. We have reviewed his claims and find that they are without merit. Points of error nine through nineteen are overruled.

The judgment of the trial court is AFFIRMED.

MEYERS, J. filed a concurring opinion.

JOHNSON, J. concurred in the result.



MEYERS, J., delivered this concurring opinion.

I write to register my disagreement with the majority's observation in connection with appellant's point of error six that "the jury could have considered as evidence of future dangerousness the fact that appellant was on parole when he committed this crime." *Majority opinion* at 854. The majority says our opinion in *King v. State*, 953 S.W.2d 266 (Tex. Crim. App. 1997), did not "specifically" place significance on such fact, but suggests it was implied. I see no such implication there:

There are several reasons that the admission of the case summaries and disciplinary reports was harmless. First, the properly admitted judgments of appellant's prior convictions showed, chronologically, convictions for theft, theft, and burglary of a habitation. Appellant committed the burglary of a habitation while on parole from the theft charges. While theft and burglary are not the most violent of crimes, going from theft to burglary of a habitation shows an escalating pattern of disrespect for the law from which a jury could draw an inference of future dangerousness....

*King*, 953 S.W.2d at 271.

Apart from the fact that the majority's comment has no basis in law, neither do I see a basis in logic. How is the fact that a defendant is serving parole at the time he commits another offense evidence of future dangerousness?<sup>1</sup> Certainly, evidence of the prior of-

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<sup>1</sup> While I would not presume to know anything about the standards utilized by the Board of Pardons and Paroles, the fact a

fense for which the defendant is on parole is probative of future dangerousness. But why is the fact that the defendant is serving community supervision while committing another crime more probative of future dangerousness than if the defendant serves out his term and then commits another crime? Why is it worse for a parolee to commit a crime than it is for a former felon to commit a crime? Of course a parolee is not supposed to commit crimes while on parole. But neither is *anyone* supposed to commit crimes. I just don't get it. At any rate, the majority does not explain its "finding" that a jury could consider such evidence as probative of future dangerousness.

With these remarks, I concur in the judgment.

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defendant was granted a parole is arguably evidence that at least the Board of Pardons and Paroles was somewhat comfortable the defendant was not a danger to society at that time.

IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS

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NO. 48,153-01

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EX PARTE CARLOS TREVINO,

*Applicant*

---

Apr. 4, 2001

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ON APPLICATION FOR A WRIT OF HABEAS CORPUS  
FROM BEXAR COUNTY

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*The order was entered per curiam. Hervey, J., not participating.*

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, V.A.C.C.P.

In July 1997, Applicant was convicted of the offense of capital murder. V.T.C.A. PENAL CODE § 19.03. The jury answered the special issues submitted pursuant to Article 37.071, V.A.C.C.P. and the trial court, accordingly, set punishment at death. Applicant's conviction was affirmed on direct appeal to this Court. *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999).

In the instant case, Applicant presents various allegations through which he challenges the validity of his conviction and resulting sentence. After a hearing

of Applicant's claims, the trial court entered findings of fact and conclusions of law and recommended that relief be denied.

Having reviewed the record, we adopt the trial court's finding of fact and conclusions of law. Accordingly, we order that relief on said grounds be denied.

IT IS SO ORDERED ON THIS THE 4<sup>th</sup> DAY OF APRIL 2001.

PER CURIAM

En banc

Do Not Publish

Hervey, J. not participating.

[STAMP:

(seal)

A True Copy

Attest:

Troy C. Bennen, Jr. Clerk

Court of Criminal Appeals of Texas

By: /s/ [illegible]  
Clerk]

IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS

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NO. WR-48,153-02

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EX PARTE CARLOS TREVINO.

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Nov. 23, 2005

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On Application for Writ of Habeas Corpus from Cause  
No. 1997-cv-1717D-W2, in the 290th Judicial District  
Court of Bexar County

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[2005 WL 3119064]

ORDER

PER CURIAM.

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

In July 1997, a Bexar County jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999). On April 19, 1999, applicant filed his initial post-conviction application for writ of habeas corpus in the convicting court. This Court subsequently denied applicant relief. *Ex parte Trevino*, No.

WR-48,153-01 (Tex. Crim. App. Apr. 4, 2001) (not designated for publication). Applicant's subsequent writ was received in this Court on September 29, 2005.

Applicant presents two allegations. We have reviewed the application and find the allegations fail to satisfy the requirements of Article 11.071, § 5(a). Accordingly, the application is dismissed as an abuse of the writ. Tex. Code Crim. Proc. Art. 11.071, § 5(c).

IT IS SO ORDERED THIS THE 23RD DAY OF NOVEMBER, 2005.

JOHNSON, J., would remand on allegation No. (1).

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

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CIVIL NO. SA-01-CA-306-XR

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CARLOS TREVINO,  
TDCJ No. 999235

*Petitioner*

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT  
OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS  
DIVISION,

*Respondent*

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Dec. 21, 2009

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[678 F. Supp. 2d 445]

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[449]

**MEMORANDUM OPINION AND ORDER**

XAVIER RODRIGUEZ, District Judge.

Petitioner Carlos Trevino filed this federal habeas corpus action pursuant to 28 U.S.C. Section 2254 challenging his July 1997, Bexar County capital murder conviction and sentence of death. For the reasons set forth at length below, petitioner is not entitled to federal habeas corpus relief from this Court but is entitled to a Certificate of Appealability.



## I. *Statement of the Case*

### A. *Factual Background*

On the evening of June 9, 1996, while on a trip to buy beer for a party he had been attending,<sup>1</sup> Santos Cervantes enticed fif- [450] teen-year-old Linda Salinas to get into a car driven by Cervantes' friend Brian Apolinar, with the assurance Apolinar would take Salinas to a nearby fast-food restaurant.<sup>2</sup> Travel-

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<sup>1</sup> Jay Mata testified at petitioner's trial, in pertinent part, (1) the petitioner, the petitioner's teenage cousin Juan "Tati" Gonzales, Santos Cervantes, Brian "Chuck Wick" Apolinar, and Seanido "Sam" Rey all attended a party held in Mata's backyard on an evening in June, 1996, where beer was consumed and marijuana smoked, (2) when Mata ran out of beer around eight or nine p.m., those five individuals left in Apolinar's vehicle to get more beer, (3) they were gone for some time, (4) when the group returned, they did not say where they had been, (5) Mata noticed Cervantes appeared "real nervous" and acted "a little scared," while the petitioner did not appear nervous or frightened, (6) Cervantes had a bag of some sort with him when the group returned to Mata's home, (7) Cervantes asked for a flammable liquid, (8) Mata later noticed Cervantes near a fire in the backyard, (9) when Mata asked petitioner what was being burned, petitioner replied "nothing," (10) and, days later, Mata noticed the remains of a cloth bag and other burned items near the spot where he had seen Cervantes and the fire on the evening in question. Statement of Facts from Petitioner's Trial (henceforth "S.F. Trial"), Volume XVI, testimony of Jay Mata, at pp. 152-210.

<sup>2</sup> Petitioner's teenage cousin Juan Gonzales testified at petitioner's trial, in pertinent part, (1) he, the petitioner, Santos Cervantes, Brian Apolinar, and Sam Rey left Mata's home to go buy beer at a nearby convenience store, (2) while he was inside the store buying food, Cervantes approached and began talking with a girl near a phone, (3) Cervantes then asked Apolinar if Apolinar would give the girl a ride to Whataburger and Apolinar said "yes," (4) the girl sat on Cervantes' lap in the front passenger seat when the group drove away from the convenience store, (5) Cervantes

ing with Apolinar, Cervantes, and Salinas that evening were Carlos Trevino (petitioner herein), petitioner's teenage cousin Juan "Tati" Gonzales, and Seanido "Sam" Rey.<sup>3</sup>

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removed the girl's bra and tossed it to Apolinar, who was driving, and Apolinar tossed it back to Cervantes, (6) he could see Cervantes and Apolinar conversing with one another but, because of the loud music inside the vehicle, could not hear their words, (7) Apolinar drove to Espada Park, where Cervantes and the girl exited the vehicle and went into the woods behind some bushes, (8) Apolinar followed them shortly thereafter, (9) Gonzales, the petitioner, and Rey followed not long thereafter, (10) he then saw Cervantes on top of the girl, having sex with her while Apolinar held the girl down by her wrists, (11) the girl was struggling to get away but unable to do so, (12) both Cervantes and Apolinar struck the girl when she tried to scream, (13) when Cervantes finished, Sam Rey took Cervantes' place and had sex with the girl while the petitioner held her down, (14) after Rey finished, Cervantes threatened the girl and she turned around, (15) Cervantes then had anal intercourse with the girl while first Apolinar, and then Rey, forced the girl to fellate them, (16) the petitioner told Gonzales it was his turn but Gonzales said no and went back to the car with Rey, (17) after a time, Rey left Gonzales at the car to return to the scene, (18) shortly thereafter, Gonzales went back into the woods and found the group had moved to a nearby creek bottom, (19) the girl was no longer moving and there was no sound coming from her, (20) he heard Sam Rey comment "we don't need no witnesses," (21) Cervantes repeated the same comment to petitioner, who responded "we'll do what we have to do," (22) Gonzales again returned to Apolinar's vehicle, and (23) when the four others returned to the car, Gonzales observed blood on both Cervantes and petitioner. S.F. Trial, Volume XVIII, testimony of Juan Gonzales, at pp. 167-97; Volume XIX, testimony of Juan Gonzales, at pp. 3-46.

<sup>3</sup> S.F. Trial, Volume XVI, Testimony of Jay Mata, at pp. 152-59; Volume XVIII, testimony of Juan Gonzales, at pp. 167-82.

Throughout the Statement of Facts from petitioner's trial, Rey's first name is spelled "Sienido." However, the affidavit exe-

Instead of driving to the restaurant, Apolinar drove the group to Espada Park, where Cervantes, Apolinar, and Rey sexually assaulted Salinas while she unsuccessfully struggled to escape.<sup>4</sup> Gonzales overheard Apolinar, Cervantes, and the petitioner discuss their mutual desire not to leave any witnesses behind.<sup>5</sup> At that point, Gonzales returned to the group's vehicle; when the other four men returned, Cervantes and the petitioner had blood on them.<sup>6</sup>

During the group's ensuing drive away from the Park and back to the Mata residence, Cervantes made a comment that it [451] was "neat" or "cool" about how her neck had snapped and also made a comment about a knife; petitioner responded with the comments "I learned how to kill in prison" and "I learned how to use a knife in prison."<sup>7</sup> When the group returned to the Mata residence, Cervantes burned Salinas' cloth backpack, which she had left in Apolinar's car when the

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cuted by Rey attached to petitioner's motion for stay, filed March 28, 2006, docket entry no. 49, spells Rey's first name as "Seanido." This Court will employ the spelling employed by Rey himself in this statement to police.

<sup>4</sup> S.F. Trial, Volume XVIII, testimony of Juan Gonzales, at pp. 167-97; Volume XIX, testimony of Juan Gonzales, at pp. 24-26.

<sup>5</sup> S.F. Trial, Volume XVIII, testimony of Juan Gonzales, at p. 191.

<sup>6</sup> *Id.*, at p. 192.

<sup>7</sup> S.F. Trial, Volume XVIII, testimony of Juan Gonzales, at p. 144; Volume XIX, testimony of Juan Gonzales, at pp. 4-6, 33-34, 44-45; Volume XXIII, testimony of Juan Gonzales, at p. 84.

group stopped at Espada Park.<sup>8</sup> When Gonzales asked Cervantes why he had killed the girl, Cervantes responded "mind your own business."<sup>9</sup> While Gonzales never saw the petitioner or anyone else with a knife at the scene of the murder, a few days *before* Salinas' murder, Gonzales had seen Cervantes with a knife and, two days *after* the murder, Cervantes told Gonzales he had broken the knife and thrown it into a river.<sup>10</sup> The petitioner thereafter told Gonzales not to say anything to the police about the incident.<sup>11</sup>

Salinas' partially nude body was discovered in Espada Park the day after the murder, *i.e.*, on June 10, 1996, in the tall grass along a trail leading down to a nearby creek.<sup>12</sup>

An autopsy revealed (1) Salinas suffered two stab wounds to the left side of her neck, one of which was fatal, (2) the fatal stab wound, to the back of the left side of Salinas' neck, partially severed her carotid artery, resulting in massive bleeding, accompanied almost immediately by a rapid decrease in blood pressure and shock, (3) Salinas sustained soft tissue hemorrhaging and bruising in her vaginal area, as well as bruising,

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<sup>8</sup> S.F. Trial, Volume XIX, testimony of Juan Gonzales, at pp. 7-12, 31; Volume XVI, testimony of Jay Mata, at pp. 159-64, 170-71, 177, 187, 189, 197-207, 210.

<sup>9</sup> S.F. Trial, Volume XIX, testimony of Juan Gonzales, at pp. 29-30.

<sup>10</sup> *Id.*, at pp. 5, 29-30, 45.

<sup>11</sup> *Id.*, at pp. 14-15.

<sup>12</sup> S.F. Trial, Volume XVI, testimony of David Vargas, at pp. 51-71.

hemorrhaging, and a laceration at her anal opening, (4) a small quantity of a metabolite of marijuana was found in Salinas' blood stream but at an insufficient level to suggest she was intoxicated at the time of her death, (5) Salinas sustained no internal injuries to her neck other than those caused by the two stab wounds, (6) there was no physical evidence anyone had attempted to "snap" her neck, and (7) there were scratches on Salinas' legs and fresh bruises to her breasts.<sup>13</sup>

### B. *Indictment*

On April 8, 1997, a Bexar County grand jury indicted petitioner in cause no. 97-CR-1717-D on a charge of capital murder, to wit, intentionally and knowingly causing the death of Linda Salinas by cutting and stabbing her with a deadly weapon while in the course of committing and attempting to commit the aggravated sexual assault of Salinas.<sup>14</sup>

### C. *Unsuccessful Plea Negotiations*

Petitioner's original trial counsel, attorney Mario Trevino (no relation to petitioner) negotiated a plea bargain on petitioner's behalf in which petitioner would enter a plea to the capital murder charge and receive a life sentence without having to [452] testify against any of his co-defendants.<sup>15</sup> During an emotional debriefing

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<sup>13</sup> S.F. Trial, Volume XIX, testimony of Vincent DiMaio, at pp. 58-91.

<sup>14</sup> Transcript of pleadings, motions, and other documents filed in petitioner's state trial court proceeding (henceforth "Trial Transcript"), Volume I, at p. 2.

<sup>15</sup> Statement of Facts from the evidentiary hearing held during petitioner's state habeas corpus proceeding (henceforth "S.F. State Habeas Hearing"), testimony of Mario Trevino, at pp. 27-30.



with personnel from the Bexar County District Attorney's office, petitioner broke down and, when the debriefing resumed a week or two later, petitioner had changed his mind and refused to accept the plea bargain offered.<sup>16</sup>

#### D. *Guilt-Innocence Phase of Trial*

The guilt-innocence phase of petitioner's trial commenced on June 19, 1997. In addition to the evidence outlined above, the jury heard testimony from DNA and forensic experts establishing (1) the examination of a pair of blue women's shorts and a pair of white women's panties found at the crime scene, both identified by Linda Salinas' mother as belonging to Linda, revealed the presence of polyester and cotton fibers which were consistent with a pair of slacks owned by the petitioner,<sup>17</sup> (2) a blood stain found on Linda Salinas' white panties contained a mixture of the DNA from at least two persons, with DNA testing eliminating all but Linda Salinas and the petitioner (from among those identified by Juan Gonzales as present at Espada Park on the night of the murder) as possible sources of the DNA included in that mixed bloodstain,<sup>18</sup> and (3) the oral, vaginal, and anal swabs taken from Linda Salinas' body during autopsy failed to reveal the

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<sup>16</sup> *Id.*, at pp. 30-31.

<sup>17</sup> S.F. Trial, Volume XVII, testimony of Karen Lanning, at pp. 141-49, 156-59, 161, 170; Volume XVIII, testimony of Dawn Salinas, at p. 60; Volume XVI, testimony of David Vasquez, at pp. 66-68; Volume XVI, testimony of Ted Prosser, at pp. 102-03, 105, 108-09; Volume XVII, testimony of Barry Gresham, at p. 33.

<sup>18</sup> S.F. Trial, Volume XIX, testimony of Lonnie Ginsberg, at pp. 114-35; Volume XXII, testimony of Lonnie Ginsberg, at pp. 5-63.

presence of sperm or seminal fluid.<sup>19</sup> On July 1, 1997, after deliberating less than six hours, petitioner's jury returned a guilty verdict.<sup>20</sup>

#### E. *Punishment Phase of Trial*

The punishment phase of petitioner's trial commenced on July 2, 1997.

The prosecution presented evidence establishing (1) petitioner was first referred to the Bexar County juvenile probation office at age thirteen, (2) as a juvenile, petitioner was adjudicated on charges of evading arrest, possession of up to two ounces of marijuana, unauthorized use of a motor vehicle, and unlawfully carrying a weapon (identified as a nine millimeter handgun), and (3) petitioner was convicted as an adult of operating a motor vehicle while intoxicated, burglary of a vehicle, and burglary of a building.<sup>21</sup> The jury also heard uncontradicted testimony establishing (1) petitioner had identified himself to a juvenile probation officer as a member of [453] a street gang<sup>22</sup> and (2) petitioner was

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<sup>19</sup> S.F. Trial, Volume XXII, testimony of Lonnie Ginsberg, at pp. 7-10, 20.

<sup>20</sup> Trial Transcript, Volume II, at pp. 148-70, 174; S.F. Trial, Volume XIX, at pp. 147-49.

The time stamps on the petitioner's guilt-innocence phase jury charge indicate the charge was delivered around 11:40 a.m. on July 1, 1997 and a time stamp on a note from the jury indicates a verdict was reached by 4:57 p.m. that same date. *Id.*

<sup>21</sup> S.F. Trial, Volume XXIII, testimony of Lorraine Reagan, at pp. 12-26; Volume XXIII, testimony of Jaime Aleman, at pp. 65-73, 80-82.

<sup>22</sup> S.F. Trial, Volume XXIII, testimony of Lorraine Reagan, at pp. 35-36.



a documented prison gang member whose body bore the tell-tale tattoos indicative of petitioner's membership in the violent prison gang *La Hermidad y Pistoleiros Latinos* ("HPL").<sup>23</sup>

The defense presented a single witness, petitioner's aunt, who testified (1) she had known petitioner all his life, (2) petitioner's father was largely absent throughout petitioner's life, (3) petitioner's mother "has alcohol problems right now," (4) petitioner's family was on welfare during his childhood, (5) petitioner was a loner in school, (6) petitioner dropped out of school and went to work for his mother's boyfriend doing roofing work, (7) petitioner is the father of one child and is good with children, often taking care of her two daughters, and (8) she knows petitioner is incapable of committing capital murder.<sup>24</sup>

On July 3, 1997, after deliberating approximately eight hours, petitioner's jury returned its verdict at the punishment phase of trial, finding (1) beyond a reasonable doubt, there is a probability the petitioner would commit criminal acts of violence which would constitute a continuing threat to society, (2) beyond a reasonable doubt the petitioner actually caused the death of Linda Salinas or, if petitioner did not actually cause her death, the petitioner intended to kill her or another, or the petitioner anticipated a human life would be taken, and (3) taking into consideration all of the evidence, including the circumstances of the offense, the petitioner's char-

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<sup>23</sup> S.F. Trial, Volume XXIII, testimony of Bob Morrill, at pp. 99-132.

<sup>24</sup> S.F. Trial, Volume XXIII, testimony of Juanita DeLeon, at pp. 135-41.

acter and background, and the petitioner's personal moral culpability, there were insufficient mitigating circumstances to warrant a sentence of life imprisonment be imposed upon petitioner.<sup>25</sup> In accordance with the jury's verdict, the state trial court imposed a sentence of death.<sup>26</sup>

#### F. *Direct Appeal*

Petitioner appealed his conviction and sentence. In appellant's brief filed September 4, 1998, petitioner presented nineteen claims for relief.<sup>27</sup> In an opinion is-

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<sup>25</sup> Trial Transcript, Volume II, at pp. 184-87; S.F. Trial, Volume XXIV, at pp. 47-49.

<sup>26</sup> S.F. Trial, Volume XXIV, at p. 50.

<sup>27</sup> In his points of error on direct appeal, petitioner argued (1) the state trial court's denial of petitioner's motion for mistrial at the conclusion of voir dire effectively deprived petitioner of any opportunity to voir dire the jury venire on their views of DNA and scientific evidence, (2) there was legally insufficient evidence to corroborate Juan Gonzales' testimony as an accomplice witness, (3) the trial court erred in admitting Gonzales' hearsay testimony regarding statements made by petitioner and Santos Cervantes, (4) there was legally insufficient evidence to support the jury's affirmative answer to the first capital sentencing special issue, the issue regarding future dangerousness, (5) the trial court erred in admitting the testimony regarding petitioner's membership in HPL, (6) the trial court failed to properly instruct the jury (i.e., define key terms) in the punishment phase jury instructions, (7) due process requires proportionality review of petitioner's capital sentence, (8) the Texas capital sentencing scheme is unconstitutional because (a) it affords the sentencing jury open-ended discretion and is unstructured, (b) the Texas statutory definition of "mitigating evidence" is unconstitutionally narrow, (c) there is no burden of proof assigned on the mitigating evidence special issue, (d) the jury is not instructed on the effect of a single holdout juror, and (e) the many capital sentencing schemes employed in Texas in recent years violate equal protection and due process concerns, (9)

[454] sued May 12, 1999, the Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence. *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999). Petitioner did not thereafter seek further review of his conviction or sentence via a petition for certiorari directed to the United States Supreme Court.

#### G. *First State Habeas Proceeding*

On April 19, 1999, while his direct appeal was still pending, petitioner filed an application for state habeas corpus relief in which he urged forty-six grounds for relief.<sup>28</sup>

The state habeas trial court held an evidentiary hearing on July 10, 2000, during which petitioner called a single witness, his former trial co-counsel, attorney Mario Trevino, who testified, in pertinent part (1) he had no difficulty communicating with petitioner, (2) the defense team contacted Juan Gonzales prior to trial and knew what testimony Gonzales would give, (3) he negotiated a waiver of the death penalty for petitioner but, after initially accepting same, petitioner later rejected this plea bargain offer, (4) petitioner never denied participating in the offense and admitted he was present when Salinas was killed, (5) whenever defense counsel pressed petitioner about the facts of the offense, how-

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the Texas death penalty is unconstitutional as currently administered, and (10) there is racial discrimination in the manner the death penalty is applied in Texas.

<sup>28</sup> The first thirty claims for relief contained in petitioner's original state habeas corpus application re-urged the same legal arguments included in petitioner's appellant's brief. The remaining claims asserted various theories of ineffective assistance by petitioner's trial counsel at both phases of petitioner's capital murder trial.

ever, petitioner responded he was too stoned at the time of the offense to recall details, (6) petitioner never denied saying "I learned to kill in prison," (7) defense counsel accepted petitioner's assertions there was no way any of petitioner's DNA could have been on Salinas' clothing, and (8) the defense team was shocked when, on the eve of trial, the prosecution produced DNA test results showing petitioner as a possible source of a mixed blood stain found on Salinas' panties.<sup>29</sup>

In an Order issued December 6, 2000, the state habeas trial court issued its findings of fact, conclusions of law, and recommendation that petitioner's state habeas corpus application be denied.<sup>30</sup> In an unpublished, per curiam Order issued April 4, 2001, the Texas Court of Criminal Appeals adopted the state habeas trial court's findings and conclusions and denied petitioner's state habeas corpus application. *Ex parte Carlos Trevino*, WR-48,153-01 (Tex. Crim. App. April 4, 2001).

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<sup>29</sup> S.F. State Habeas Hearing, testimony of Mario Trevino, at pp. 21-54.

<sup>30</sup> State Habeas Transcript, Volume II, at pp. 64-95.

The state habeas trial court concluded most of petitioner's substantive claims had already been rejected on the merits during petitioner's direct appeal, and therefore, could not furnish a basis for state habeas corpus relief. As to petitioner's ineffective assistance claims, the state habeas trial court concluded there was no evidentiary support for petitioner's arguments about his trial counsels' performance and, based upon the evidence presented during petitioner's state habeas corpus hearing, found nothing unreasonable with the strategic decisions made by petitioner's trial counsel.

#### H. *Initial Proceedings in this Court*

On March 14, 2002, represented by the same attorney (Albert Rodriguez) who had represented petitioner during his original state habeas corpus proceeding, petitioner filed his original petition for federal habeas [455] corpus relief in this Court, asserting four claims for relief. *Docket entry no. 10.*

After the respondent filed an answer and motion for summary judgment (*docket entry no. 12*), attorney Rodriguez filed a motion to withdraw, citing health concerns. *Docket entry no. 14.* This Court granted attorney Rodriguez's motion for leave to withdraw and appointed new counsel to represent petitioner herein. *Docket entry nos. 17 & 21.*

Petitioner subsequently filed, and this Court granted, an unopposed motion for stay, seeking leave to return to state court and explore a potential mental retardation claim, as well as other unexhausted claims. *Docket entry nos. 36 & 37.*

#### I. *Second State Habeas Proceedings*

On August 15, 2004, petitioner filed his second state habeas corpus application, asserting new claims that (1) his trial counsel rendered ineffective assistance by failing to adequately investigate, develop, and present available mitigating evidence during the punishment phase of petitioner's capital trial and (2) the Supreme Court's holding in *Atkins v. Virginia* precluded petitioner's execution because petitioner suffers from fetal alcohol syndrome. In an unpublished, per curiam Order issued November 23, 2005, the Texas Court of Criminal Appeals dismissed petitioner's second state habeas corpus application pursuant to the Texas writ-abuse



statute. *Ex parte Carlos Trevino*, WR-48,153-02, 2005 WL 3119064 (Tex. Crim. App. November 23, 2005).

J. *Further Proceedings in this Court*

This Court issued a new scheduling order in December 2005. *Docket entry no. 42*. Thereafter, petitioner filed, and this Court granted in August 2006, another motion for stay in which petitioner sought to return to state court and exhaust a new, unexhausted, *Brady* claim based on the discovery of a witness statement given by petitioner's accomplice Seanido "Sam" Rey in which Rey stated that Santos Cervantes told Rey he (Cervantes) had stabbed Salinas. *Docket entry nos. 49, 50 & 54*.

K. *Further State Court Proceedings*

Petitioner thereafter filed a motion for appointment of counsel in state court, seeking legal representation in connection with his new *Brady* claim. However, despite the passage of more than two years and the best efforts of counsel for the parties now before this Court to get the state judicial officer in question to act, the state judicial officer to whom the petitioner's motion for appointment of counsel was referred steadfastly refused to rule on petitioner's motion.

L. *Return to this Court*

In an Order issued October 2, 2008, this Court lifted the stay and set deadlines for the completion of the remainder of the proceedings in this cause. *Docket entry no. 62*.

On December 8, 2008, petitioner filed his amended petition for federal habeas corpus relief, in which he asserted eight grounds for relief. *Docket entry no. 76*.

Respondent filed his Answer thereto on June 22, 2009. *Docket entry no. 82.*

Petitioner filed his response to respondent's Answer on September 14, 2009.

## II. AEDPA Standard of Review

Because petitioner filed his federal habeas corpus action after the effective date of the AEDPA, this Court's review of petitioner's claims for federal habeas corpus relief is governed by the AEDPA. *Penry v. Johnson*, 532 U.S. 782, 792, 121 S. Ct. 1910, 1918, 150 L. Ed. 2d 9 (2001). Under the AEDPA standard of review, [456] this Court cannot grant petitioner federal habeas corpus relief in this cause in connection with any claim that was adjudicated on the merits in state court proceedings, unless the adjudication of that claim either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Payton*, 544 U.S. 133, 141, 125 S. Ct. 1432, 1438, 161 L. Ed. 2d 334 (2005); *Williams v. Taylor*, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 1519, 146 L. Ed. 2d 389 (2000); 28 U.S.C. § 2254(d).

The Supreme Court has concluded the "contrary to" and "unreasonable application" clauses of 28 U.S.C. Section 2254(d)(1) have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 1850, 152 L. Ed. 2d 914 (2002). Under the "contrary to" clause, a federal habeas court may grant relief if (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or (2) the state court decides a case differently than the Supreme



Court on a set of materially indistinguishable facts. *Brown v. Payton*, 544 U.S. at 141, 125 S. Ct. at 1438; *Mitchell v. Esparza*, 540 U.S. 12, 15-16, 124 S. Ct. 7, 10, 157 L. Ed. 2d 263 (2003) (“A state court’s decision is ‘contrary to’ our clearly established law if it ‘applies a rule that contradicts the governing law set forth in our cases’ or it ‘confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.’”). A state court’s failure to cite governing Supreme Court authority does not, *per se*, establish the state court’s decision is “contrary to” clearly established federal law: “the state court need not even be aware of our precedents, ‘so long as neither the reasoning nor the result of the state-court decisions contradicts them.’” *Mitchell v. Esparza*, 540 U.S. at 16, 124 S. Ct. at 10.

Under the “unreasonable application” clause, a federal habeas court may grant relief if the state court identifies the correct governing legal principle from the Supreme Court’s decisions but unreasonably applies that principle to the facts of the petitioner’s case. *Brown v. Payton*, 544 U.S. at 141, 125 S. Ct. at 1439; *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S. Ct. 2527, 2534-35, 156 L. Ed. 2d 471 (2003). A federal court making the “unreasonable application” inquiry should ask whether the state court’s application of clearly established federal law was “objectively unreasonable.” *Wiggins v. Smith*, 539 U.S. at 520-21, 123 S. Ct. at 2535. The focus of this inquiry is on whether the state court’s application of clearly established federal law was objectively unreasonable; an “unreasonable” application is different from a merely “incorrect” one. *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 1939, 167 L. Ed. 2d 836 (2007) (“The question under the AEDPA

is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.”); *Wiggins v. Smith*, 539 U.S. at 520, 123 S. Ct. at 2535; *Price v. Vincent*, 538 U.S. 634, 641, 123 S. Ct. 1848, 1853, 155 L. Ed. 2d 877 (2003) (“it is the habeas applicant’s burden to show that the state court applied that case to the facts of his case in an objectively un-reasonable manner”).

Legal principles are “clearly established” for purposes of AEDPA review when the holdings, as opposed to the dicta, of Supreme Court decisions as of the time of the relevant state-court decision establish those principles. *Yarborough v. Alva- [457] rado*, 541 U.S. 652, 660-61, 124 S. Ct. 2140, 2147, 158 L. Ed. 2d 938 (2004) (“We look for ‘the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.’”); *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 1172, 155 L. Ed. 2d 144 (2003).

The AEDPA also significantly restricts the scope of federal habeas review of state court fact findings. A petitioner challenging state court factual findings must establish by clear and convincing evidence that the state court’s findings were erroneous. *Schriro v. Landrigan*, 550 U.S. at 473-74, 127 S. Ct. at 1939-40 (“AEDPA also requires federal habeas courts to presume the correctness of state courts’ factual findings unless applicants rebut this presumption with ‘clear and convincing evidence.’”); *Rice v. Collins*, 546 U.S. 333, 338-39, 126 S. Ct. 969, 974, 163 L. Ed. 2d 824 (2006) (“State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by ‘clear and convincing evidence.’”); *Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S. Ct. 2317,

2325, 162 L. Ed. 2d 196 (2005) (“[W]e presume the Texas court’s factual findings to be sound unless *Miller-El* rebuts the ‘presumption of correctness by clear and convincing evidence.’”); 28 U.S.C. § 2254(e)(1).

However, the deference to which state-court factual findings are entitled under the AEDPA does not imply an abandonment or abdication of federal judicial review. See *Miller-El v. Dretke*, 545 U.S. at 240, 125 S. Ct. at 2325 (the standard is “demanding but not insatiable”); *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 1041, 154 L. Ed. 2d 931 (2003) (“Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief.”).

Finally, in this Circuit, a federal habeas court reviewing a state court’s rejection on the merits of a claim for relief pursuant to the AEDPA must focus exclusively on the propriety of the ultimate decision reached by the state court and not evaluate the quality, or lack thereof, of the state court’s written opinion supporting its decision. See *St. Aubin v. Quarterman*, 470 F.3d 1096, 1100 (5th Cir. 2006) (holding Section 2254(d) permits a federal habeas court to review only a state court’s decision and not the written opinion explaining that decision), *cert. denied*, 550 U.S. 921 (2007); *Amador v. Quarterman*, 458 F.3d 397, 410 (5th Cir. 2006) (holding the same), *cert. denied*, 550 U.S. 920 (2007); *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003) (holding the precise question before a federal habeas court in reviewing a state court’s rejection on the merits of an ineffective assistance claim is whether the state court’s ultimate conclusion was objectively reasonable), *cert. denied*, 541 U.S. 1045 (2004); *Anderson v. Johnson*, 338 F.3d 382, 390 (5th Cir. 2003) (holding a federal habeas court reviews only a state court’s decision and not the

opinion explaining that decision); *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (holding a federal court is authorized by § 2254(d) to review only a state court's decision and not the written opinion explaining that decision), *cert. denied*, 537 U.S. 1104 (2003).

### III. *Brady Claim*

#### A. *The Claim*

In his first claim in his amended petition, petitioner argues his constitutional rights under the Supreme Court's holding in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), were [458] violated when the prosecution withheld from petitioner's trial counsel Seanido Rey's June 12, 1996 statement to police indicating Santos Cervantes claimed to have actually stabbed Salinas.<sup>31</sup> Because no state court has yet either addressed the merits of this claim or dismissed same as procedurally defaulted, this Court's review of this claim is necessarily *de novo*. See *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S. Ct. 2456, 2467, 162 L. Ed. 2d 360 (2005) (holding *de novo* review of the prejudice prong of *Strickland* was required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice).

#### B. *Circumstances That Render State Habeas Processes Ineffective*

Respondent correctly points out that petitioner has thus far been unable to obtain a ruling from the state courts on the merits of petitioner's *Brady* claim. Under

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<sup>31</sup> Petitioner's Amended Petition, filed December 8, 2008, docket entry no. 76, at pp. 20-26.

the circumstances of this case, that failure cannot reasonably be ascribed to any fault of the petitioner.

It was petitioner's *federal* habeas counsel who first discovered the statement of Seanido Rey that forms the basis for petitioner's *Brady* claim. When confronted with a non-frivolous *Brady* claim (*see docket entry no. 49*), this Court stayed this cause for the express purpose of permitting petitioner an opportunity to return to state court to exhaust state habeas remedies on his newly discovered, non-frivolous claim. Thereafter, petitioner filed a motion for appointment of counsel in the appropriate state trial court for the purpose of obtaining the assistance of counsel to exhaust state habeas remedies on petitioner's *Brady* claim. However, for reasons known only to the state judicial officer who had the responsibility to address petitioner's motion, and despite explicit entreaties from this Court (*see docket entry no. 61*), more than two years passed with no indication the courts of the State of Texas would *ever* address petitioner's motion. The applicable federal statute prohibits this Court from granting relief unless the petitioner has either (1) exhausted available state court remedies, (2) there is an absence of available state corrective process, or (3) circumstances exist that render such process *ineffective* to protect the federal habeas petitioner's rights. 28 U.S.C. § 2254(b)(1). The refusal of the responsible state judicial officer to even address petitioner's motion for appointment of counsel for more than two years convinces this Court that circumstances exist that render any otherwise available state habeas processes wholly ineffective to protect petitioner's federal constitutional rights. Any procedure that compels a death row inmate to litigate a non-frivolous *Brady* claim in the state courts without the assistance of counsel is necessarily



ineffective to protect that prisoner's federal constitutional rights. Therefore, petitioner's failure to exhaust available state remedies with regard to his *Brady* claim is statutorily excused in this case.

### C. *The Applicable Constitutional Standard*

As this Court has noted on many occasions, few constitutional principles are more firmly established by Supreme Court precedent than the rule that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, [459] irrespective of the good faith or bad faith of the prosecution." *Banks v. Dretke*, 540 U.S. 668, 691, 124 S. Ct. 1256, 1272, 157 L. Ed. 2d 1166 (2004); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963); *Bartee v. Quarterman*, 574 F. Supp. 2d 624, 690-93 (W.D. Tex. 2008), *CoA denied*, 339 F. App'x 429 (5th Cir. 2009), *cert. filed November 23, 2009* (09-7757); *Moore v. Quarterman*, 526 F. Supp. 2d 654, 678-79 (W.D. Tex. 2007), *CoA denied*, 534 F.3d 454 (5th Cir. 2008); *Berkley v. Quarterman*, 507 F. Supp. 2d 692, 746 (W.D. Tex. 2007), *CoA denied*, 310 F. App'x 665 (5th Cir. 2009), *cert. denied*, \_\_ U.S. \_\_\_, 130 S. Ct. 366, 175 L. Ed. 2d 70 (2009).

The Supreme Court has consistently held the prosecution's duty to disclose evidence material to either guilt or punishment, *i.e.*, the rule announced in *Brady v. Maryland*, applies even when there has been no request by the accused. *Banks v. Dretke*, 540 U.S. at 690, 124 S. Ct. at 1272; *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999); *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 2399, 49 L. Ed. 2d 342 (1976). This duty also applies to impeachment evidence. *Strickler v. Greene*, 527 U.S. at

280, 119 S. Ct. at 1948; *United States v. Bagley*, 473 U.S. 667, 676 & 685, 105 S. Ct. 3375, 3380 & 3385, 87 L. Ed. 2d 481 (1985).

"[T]he individual prosecutor has a duty to learn of any favorable evidence *known to the others acting on the government's behalf* in this case, including the police." *Strickler v. Greene*, 527 U.S. at 281, 119 S. Ct. at 1948 (emphasis added); *Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S. Ct. 1555, 1567-68, 131 L. Ed. 2d 490 (1995).

Under clearly established Supreme Court precedent, there are three elements to a *Brady* claim: (1) the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be "material," *i.e.*, prejudice must have ensued from its non-disclosure. *Banks v. Dretke*, 540 U.S. at 691, 124 S. Ct. at 1272; *Strickler v. Greene*, 527 U.S. at 281-82, 119 S. Ct. at 1948. Evidence is "material" under *Brady* where there exists a "reasonable probability" that had the evidence been disclosed the result at trial would have been different. *Banks v. Dretke*, 540 U.S. at 698-99, 124 S. Ct. at 1276.

The Supreme Court has emphasized four aspects of the *Brady* materiality inquiry. First, a showing of materiality does *not* require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted in the defendant's acquittal. See *United States v. Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383 (expressly adopting the "prejudice" prong of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), analysis of ineffective assistance claims as the appropriate standard for determin-



ing “materiality” under *Brady*). Second, the materiality standard is *not* a sufficiency of the evidence test. *Kyles v. Whitley*, 514 U.S. at 434-35, 115 S. Ct. at 1566. Third, once materiality is established, harmless error analysis has no application. *Kyles v. Whitley*, 514 U.S. at 435-36, 115 S. Ct. at 1566-67. Finally, materiality must be assessed collectively, not item by item. *Kyles v. Whitley*, 514 U.S. at 436-37, 115 S. Ct. at 1567. The rule in *Brady* applies to impeachment evidence. *Strickler v. Greene*, 527 U.S. at 280, 119 S. Ct. at 1948; *United States v. Bagley*, 473 U.S. at 676 & 685, 105 S. Ct. at 3380 & 3385.

#### D. *Synthesis*

There are many unresolved factual disputes before this Court concerning [460] precisely what documentation was made available to petitioner’s trial counsel by the prosecution before and during petitioner’s capital murder trial. More specifically, there appears to be a genuine issue of material fact regarding whether petitioner’s accomplice Rey’s statement, which indicated Cervantes admitted to Rey that he stabbed Salinas, was ever made available to petitioner’s trial counsel. It is unnecessary to resolve these disputes because, having reviewed the evidence from both phases of petitioner’s trial, this Court concludes Rey’s statement does not satisfy the “materiality” prong for purposes of *Brady* analysis.

##### 1. *Guilt-Innocence Phase of Trial*

The trial testimony of petitioner’s teenage cousin Juan “Tati” Gonzales did *not* place the murder weapon in petitioner’s hands. Gonzales’ testimony at the guilt-innocence phase of petitioner’s trial tended to minimize petitioner’s role in the offense and emphasize Cervantes’ role as the person who lured Salinas into

Apolinar's vehicle, took the lead in beating and sexually assaulting Salinas, and then burned Salinas' backpack.<sup>32</sup> Furthermore, Gonzales was clear that (1) he never saw anyone with a knife or other weapon in their hands at the crime scene, (2) he saw blood on both petitioner and Cervantes when they returned to Apolinar's vehicle, (3) it was Cervantes who brought up the subject of a knife during the group's drive away from Espada Park, (4) Cervantes did own a knife, which Cervantes told Gonzales he destroyed and threw into a river only days after Salinas' murder, (5) Gonzales knew the girl was dead based on Cervantes' statements, and (6) Gonzales asked Cervantes why Cervantes had murdered the girl.<sup>33</sup> Gonzales likewise made it clear he held Cervantes responsible for the girl's murder.<sup>34</sup> Nothing in Rey's statement to police suggests any of the foregoing testimony by Gonzales was factually inaccurate.

The only evidence before petitioner's jury at the guilt-innocence phase of trial obliquely suggesting petitioner might have been the person who killed Salinas consisted of an exchange between the petitioner and Cervantes recounted by Gonzales in which Cervantes made a comment to petitioner to which petitioner responded with "I learned how to kill."<sup>35</sup> However, ac-

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<sup>32</sup> S.F. Trial, Volume XIX, testimony of Juan Gonzales, at pp. 7-10, 20-26.

<sup>33</sup> S.F. Trial, Volume XVIII, testimony of Juan Gonzales, at p. 192; Volume XIX, testimony of Juan Gonzales, at pp. 4-6, 29-31, 33-34, 44-45.

<sup>34</sup> S.F. Trial, Volume XIX, testimony of Juan Gonzales, at p. 31.

<sup>35</sup> *Id.*, at p. 5.

according to Gonzales, this comment by petitioner was made in response to Cervantes' bizarre comment about snapping the girl's neck, something which the medical examiner testified had not, in fact, occurred.<sup>36</sup> Furthermore, the only other inculpatory exchange between petitioner and Cervantes recounted for the jury by Gonzales during the guilt-innocence phase of trial consisted of petitioner allegedly responding to Cervantes and Rey's comments about not wanting any witnesses with a statement "we'll do what we have to do."<sup>37</sup> However, on cross-examination, Gonzales admitted that the conversation in question took place at the crime scene in a mixture of both English and Spanish and that peti- [461] tioner's actual words could have been "do what you have to do."<sup>38</sup> Thus, there was virtually no evidence before the jury at the guilt-innocence phase of trial, even when Gonzales' testimony is considered in the light most favorable to the prosecution's theory of the case, suggesting the petitioner was the one who actually stabbed Salinas.

Therefore, rather than refuting Gonzales' trial testimony during the guilt-innocence phase of trial, Rey's newly discovered statement to police identifying Cervantes as the person who actually stabbed Salinas did little more than corroborate Gonzales' version of the critical events, which tended to emphasize Cervantes as the principal actor in Salinas' abduction,

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<sup>36</sup> *Id.*, at pp. 5-6.

<sup>37</sup> S.F. Trial, Volume XVIII, testimony of Juan Gonzales, at p. 191.

<sup>38</sup> S.F. Trial, Volume XIX, testimony of Juan Gonzales, at pp. 33-34.

sexual assault, and murder. Thus, Rey's statement would have possessed little-to-no impeachment value in terms of Gonzales' guilt-innocence phase testimony. Rey's statement, assuming it could have been admitted as that of a co-conspirator made in the furtherance of a criminal conspiracy or under an exception to the Hearsay Rule,<sup>39</sup> at best would have confirmed what Gonzales had already strongly suggested to the jury, *i.e.*, that Cervantes was responsible for Salinas' murder. More significantly, nothing in Rey's statement to police suggests there was anything factually inaccurate about any inculpatory aspect of Gonzales' testimony during the guilt-innocence phase of petitioner's trial.

At the guilt-innocence phase of trial, the state trial court charged petitioner's jury under the Texas law of parties:

Our law provides a person is criminally responsible as a party to an offense if the offense is committed by his own conduct, or by the conduct of another for which he is criminally responsible, or by both. Each party to an offense may be charged with commission of the offense.

Mere presence alone will not make a person a party to an offense. A person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense he

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<sup>39</sup> Petitioner has furnished this Court with no affidavit from Rey or any other evidence suggesting Rey was "available" or willing to testify at the time of petitioner's trial to the same facts set forth in Rey's June 12, 1996 affidavit.

solicits, encourages, directs, aids or attempts to aid the other person to commit the offense.

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy. Capital murder and aggravated sexual assault are felonies.

The term "conspiracy", as used in these instructions, means an agreement between two or more persons, with intent that a felony be committed, that they, or one or more of them, engage in conduct that would constitute the offense. An agreement constituting a conspiracy may be inferred from acts of the parties.<sup>40</sup>

Thus, petitioner's jury properly could have convicted petitioner without a showing that petitioner was the person who fatally stabbed Salinas.

[462] Even more significantly, petitioner has alleged no facts, much less furnished this Court with any evidence, suggesting any of the inculpatory comments attributed to the petitioner by Gonzales during the guilt-innocence phase of petitioner's trial were factually inaccurate or erroneously recounted. On the contrary, the record now before this Court includes the uncontradicted testimony of petitioner's former lead trial

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<sup>40</sup> Trial Transcript, Volume II, at pp. 150-51.



counsel, which established petitioner never informed his trial counsel that any of Gonzales' trial testimony was factually inaccurate.<sup>41</sup> Petitioner never denied to his trial counsel being physically present when Salinas was murdered.<sup>42</sup> Nothing in Rey's statement to police suggests Gonzales testified falsely about the petitioner (1) holding Salinas down while Rey raped her,<sup>43</sup> (2) telling Cervantes either "we'll do what we have to do" or "do what you have to do" in response to comments from Rey and Cervantes about their desire not to leave any witnesses,<sup>44</sup> or (3) telling Gonzales to say nothing to the police about the incident.<sup>45</sup> At best, Rey's hearsay-within-hearsay statement to police establishes Cervantes stabbed Salinas. The medical examiner testified without contradiction that Salinas was stabbed twice. Nothing in Rey's statement forecloses the possibility Cervantes and the petitioner each stabbed Salinas once. Thus, Rey's statement to police does not afford any basis for impeaching the most salient, inculpatory, portions of Gonzales' testimony at the guilt-innocence phase of petitioner's trial.

Given the record at the guilt-innocence phase of petitioners trial, there is simply no reasonable probability

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<sup>41</sup> S.F. State Habeas Hearing, testimony of Mario Trevino, at pp. 26, 34, 38, 46, 53.

<sup>42</sup> *Id.*, at pp. 34, 38.

<sup>43</sup> S.F. Trial, Volume XVIII, testimony of Juan Gonzales, at pp. 194-96.

<sup>44</sup> S.F. Trial, Volume XVIII, testimony of Juan Gonzales, at p. 191; Volume XIX, testimony of Juan Gonzales, at pp. 33-34.

<sup>45</sup> S.F. Trial, Volume XIX, testimony of Juan Gonzales, at pp. 14-15.

that, but for the failure of the prosecution to disclose Rey's statement to petitioner's trial counsel, the outcome of the guilt-innocence phase of petitioner's trial would have been different. *See Banks v. Dretke*, 540 U.S. at 698-99, 124 S. Ct. at 1276 (holding evidence is "material" under *Brady* where there exists a "reasonable probability" that, had the evidence been disclosed, the result at trial would have been different).

## 2. *Punishment Phase of Trial*

As was explained above, during the punishment phase of petitioner's trial, the jury was faced not only with the brutal details of Salinas' sexual assault and murder, but also with evidence establishing the petitioner (1) came from a poor, broken family background, which including an absent father and an alcoholic mother,<sup>46</sup> (2) had been on his own most of his life,<sup>47</sup> (3) admitted to membership in a street gang as a teenager,<sup>48</sup> (4) had been convicted as a youth and adult of a wide range of offenses, including auto theft, burglary, evading arrest, driving while intoxicated, and illegally carrying a handgun,<sup>49</sup> and (5) [463] bore numerous tattoos indicating his membership in a notoriously violent

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<sup>46</sup> S.F. Trial, Volume XXIII, testimony of Lorraine Reagan, at pp. 30-36; testimony of Juanita DeLeon, at pp. 135-39.

<sup>47</sup> *Id.*, testimony of Juan Gonzales, at p. 85; testimony of Juanita DeLeon, at pp. 137-39.

<sup>48</sup> *Id.*, testimony of Lorraine Reagan, at pp. 35-36.

<sup>49</sup> *Id.*, testimony of Lorraine Reagan, at pp. 14-26; testimony of Dario Gonzales, at pp. 43-46; testimony of Maria Teresa Espinosa, at pp. 48-51; testimony of John Anthony Riojas, at pp. 58-63; testimony of Jaime Aleman, at pp. 67-72, 80-82.



prison gang.<sup>50</sup> More significantly, petitioner's jury was faced with a record utterly bereft of any indication the petitioner had ever accepted responsibility for his involvement in Salinas' murder or expressed sincere contrition over her death. On the contrary, Gonzales testified without contradiction during the guilt-innocence phase of trial that, at one point during the sexual assault upon the fifteen-year-old Salinas, the petitioner urged Gonzales to rape Salinas.<sup>51</sup> Moreover, during the punishment phase of petitioner's trial, Gonzales also testified without contradiction the petitioner (1) told Cervantes "I learned how to kill in prison" and "I learned how to use a knife in prison," and (2) had only been out of prison a few weeks prior to Salinas' murder.<sup>52</sup>

Significantly, Gonzales admitted he never saw the petitioner sexually assault or stab Salinas.<sup>53</sup> Thus, nothing in Rey's statement to police (about Cervantes' confession to having stabbed Salinas) contradicts or impeaches any of Gonzales' most aggravating testimony establishing the petitioner (1) held Salinas down while Rey sexually assaulted her, (2) urged Gonzales to participate in the sexual assault of Salinas, (3) said nothing to dissuade Cervantes and Rey from killing

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<sup>50</sup> *Id.*, testimony of Bob Morrill, at pp. 98-132.

<sup>51</sup> S.F. Trial, Volume XVIII, testimony of Juan Gonzales, at p. 185.

<sup>52</sup> S.F. Trial, Volume XXIII, testimony of Juan Gonzales, at pp. 84-85.

<sup>53</sup> S.F. Trial, Volume XVIII, testimony of Juan Gonzales, at pp. 192-96; Volume XIX, testimony of Juan Gonzales, at pp. 26-29, 31, 44-45; Volume XXIII, testimony of Juan Gonzales, at pp. 86-88.

Salinas when they commented they did not want to leave any witnesses, (4) had blood on him when he returned to Apolinar's vehicle, (5) urged Gonzales not to tell the police what happened the night of the murder, (6) had been out of prison only a few weeks at the time of Salinas' murder, or (7) told Cervantes he (the petitioner) had "learned how to kill in prison."

In addition, petitioner's sentencing jury also had before it the uncontradicted testimony of Jay Mata establishing that, after their return to Mata's residence the evening of Salinas' murder, the petitioner appeared nonchalant while Cervantes appeared nervous, scared, and introspective.<sup>54</sup>

During the punishment phase of petitioner's capital murder trial, the jury was confronted with three special issues inquiring whether (1) beyond a reasonable doubt there was a probability the petitioner would commit criminal acts of violence that would constitute a continuing threat to society, (2) beyond a reasonable doubt the petitioner actually caused the death of Salinas or, if he did not actually cause Salinas' death, he intended to kill Salinas or another or he anticipated that a human life would be taken, and (3) taking into consideration all of the evidence, including the circumstances of the offense and the petitioner's character, background, and personal moral culpability, there were sufficient mitigating circumstances to warrant a sentence of life imprisonment, rather than a death sentence, be imposed.<sup>55</sup>

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<sup>54</sup> S.F. Trial, Volume XVI, testimony of Jay Mata, at pp. 164-66, 188, 209-10.

<sup>55</sup> Trial Transcript, Volume II, at pp. 176-89.

[464] Rey's statement to police is most directly relevant to the second special issue, which still allowed an affirmative answer even if the jury were convinced, as Gonzales had strongly suggested throughout his trial testimony (and as Rey stated to police), that Cervantes was the person who actually stabbed Salinas. The upshot of Rey's statement is also somewhat relevant to the mitigation special issue. The problem for petitioner in terms of the materiality analysis under *Brady* is that petitioner does not contest the accuracy of any of Gonzales' relevant trial testimony.

Moreover, nothing in Rey's statement to police dated June 12, 1996 contradicts the accuracy of Gonzales' testimonial recitation of the inculpatory and aggravating statements made by petitioner to Cervantes. Likewise, Rey does not claim in his statement to have actually witnessed Salinas' murder or to possess any personal knowledge of who stabbed Salinas. Instead, like Gonzales, Rey merely claims to have engaged in a conversation after the fact during which Cervantes claimed to have stabbed Salinas himself. In addition, the "mitigating" aspects of Rey's statement to police also must be weighed in light of the absence therein of any admission by Rey that he participated in the sexual assault on Salinas. Rey's sexual assault on Salinas played a prominent role in Gonzales' trial testimony but petitioner does not allege, even at this date, Gonzales

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While the state trial court's jury instructions do not include the "beyond a reasonable doubt" burden of proof with regard to the first special issue, i.e., the future dangerousness special issue, the verdict form, which petitioner's jury answered unanimously, does include this burden of proof standard in the language of special issue one.

was inaccurate in his description of the sexual assault on Salinas.

Under these circumstances, there is no reasonable probability that, but for the failure of the prosecution to disclose to petitioner's trial counsel Rey's statement to police (stating Cervantes had confessed to stabbing Salinas), the outcome of the punishment phase of petitioner's capital murder trial would have been different. More simply, there is no reasonable probability the petitioner's jury would have answered any of the capital sentencing special issues differently had the prosecution made Rey's statement available to petitioner's trial counsel.

#### E. *Conclusions*

Assuming that Rey's recently discovered statement of June 12, 1996 satisfies the other prongs of the *Brady* analysis, petitioner's claim fails because the contents of Rey's statement to police indicating Cervantes claimed to have stabbed Salinas were not "material" within the meaning of *Brady*. See *Banks v. Dretke*, 540 U.S. at 698-99, 124 S. Ct. at 1276 (holding evidence is "material" under *Brady* where there exists a "reasonable probability" that, had the evidence been disclosed, the result at trial would have been different). Rey's statement does not negate Gonzales' trial testimony. Viewed in the context of petitioner's trial, there is no reasonable probability the disclosure of Rey's statement to petitioner's trial counsel would have resulted in a different outcome at either phase of petitioner's capital murder trial. Petitioner's first claim herein does not warrant federal habeas relief.

#### IV. *Ineffective Assistance Claims*

##### A. *The Claims*

In the second, third, and sixth claims of his amended petition, petitioner argues his trial counsel rendered ineffective assistance by failing to (1) discover and employ Rey's statement of June 12, 1996 during petitioner's trial, (2) investigate, develop, and present mitigating evidence during the punishment phase of petitioner's capital murder trial, (3) meaningfully convey the [465] plea bargain offered to petitioner by the prosecution, and (4) object on hearsay grounds to the inculpatory statements made by petitioner recounted at trial by Juan Gonzales.<sup>56</sup>

##### B. *The Constitutional Standard*

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of *trial* counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984):

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant

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<sup>56</sup> Petitioner's Amended Petition, filed December 8, 2008, docket entry no. 76, at pp. 26-40, 48-52.



must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

To satisfy the first prong of *Strickland*, i.e., establish that his counsel's performance was constitutionally deficient, a convicted defendant must show that counsel's representation "fell below an objective standard of reasonableness." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 390-91, 120 S. Ct. 1495, 1511, 146 L. Ed. 2d 389 (2000). In so doing, a convicted defendant must carry the burden of proof and overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. at 687-91, 104 S. Ct. at 2064-66. Courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight. See *Wiggins v. Smith*, 539 U.S. at 523, 123 S. Ct. at 2536 (holding the proper analysis under the first prong of *Strickland* is an objective review of the reasonableness of counsel's performance under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from the perspective of said counsel at the time). It is strongly presumed counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. at 690, 104 S. Ct. at 2066.

To satisfy the "prejudice" prong, a convicted defendant must establish a reasonable probability that, but for the objectively unreasonable misconduct of his counsel, the result of the proceeding would have been



different. *Wiggins v. Smith*, 539 U.S. at 534, 123 S. Ct. at 2542; *Strickland v. Washington*, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is a probability sufficient to under-mine confidence in the outcome of the proceeding. *Id.* In evaluating prejudice, a federal habeas court must re-weigh the evidence in aggravation against the totality of available mitigating evidence. *Wiggins v. Smith*, 539 U.S. at 534, 123 S. Ct. at 2542.

In evaluating petitioner's complaints about the performance of his counsel under the AEDPA, the issue before this Court is whether the Texas Court of Criminal Appeals could reasonably have concluded petitioner's complaints about his trial counsel's performance failed to satisfy either prong of the *Strickland* analysis. *Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003), *cert. denied*, 540 U.S. 1154 (2004). In making this determination, this Court must consider the underlying *Strickland* standard. *Id.* In those instances in which the state courts failed to adjudicate either prong of the *Strickland* test, this Court's review of the unadjudicated prong is *de novo*. See *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S. Ct. 2456, 2467, 162 L. Ed. 2d 360 (2005) (holding *de novo* review of the prejudice prong of *Strickland* was required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice); *Wiggins v. Smith*, 539 U.S. at 534, 123 S. Ct. at 2542 (same).

A habeas petitioner has the burden to prove both prongs of the *Strickland* ineffective assistance standard by a preponderance of the evidence. *Montoya v. Johnson*, 226 F.3d 399, 408 (5th Cir. 2000), *cert. denied*, 532 U.S. 1067 (2001).

### C. *Failure to Discover and Employ Rey's Statement*

Petitioner argues his trial counsel should have investigated the case against petitioner more thoroughly, discovered Rey's statement of June 12, 1996, and employed same during both phases of petitioner's capital murder trial.

#### 1. *Circumstances That Render State Process Ineffective*

For the same reasons discussed at length in Section III.B. above, the refusal of the responsible state judicial officer to rule on petitioner's motion for appointment of counsel when petitioner sought legal assistance to fairly present his unexhausted second claim herein to the state habeas court excuses petitioner's failure to exhaust available state remedies on this aspect of petitioner's ineffective assistance claims herein.

#### 2. *Standard of Review*

For the reasons discussed in Section III.A. above, this Court must undertake a *de novo* review of petitioner's second claim herein, the ineffective assistance claim, which no state court has yet addressed on the merits or dismissed on procedural grounds.

#### 3. *Synthesis*

For the same reasons discussed at length in Section III.D. above, petitioner's complaints about his trial counsel's failure to discover and employ Seanido Rey's June 12, 1996 statement during petitioner's capital murder trial do not satisfy the prejudice prong of *Strickland* analysis. There is no reasonable probability that, but for the failure of petitioner's trial counsel to discover and employ Rey's statement during petitioner's trial, the outcome of either phase of petitioner's capital murder trial would have been different. Rey's

hearsay-within-hearsay statement, even assuming it could have been admitted as a co-conspirator's statement made in the furtherance of a criminal conspiracy or under some other exception to the Hearsay Rule, would have furnished virtually no impeachment value vis-a-vis Gonzales' trial testimony.

Juan Gonzales made it clear throughout his trial testimony that he considered Santos Cervantes the person responsible for the death of Linda Salinas. Rey's hearsay-within-hearsay statement suggesting Cervantes admitted to having stabbed Salinas offers little in the way of [467] truly exculpatory or mitigating evidence. The medical examiner testified without contradiction that Salinas was stabbed twice. Petitioner alleges no new facts, and Rey's statement contains none, that challenge the factual accuracy of Gonzales' trial testimony regarding either the conduct of, or comments made by, petitioner before, during, or after Salinas' murder.

#### 4. *Conclusions*

The contents of Seanido Rey's June 12, 1996 statement to police do not satisfy the prejudice prong of *Strickland* analysis. Petitioner's second claim herein does not, therefore, warrant federal habeas corpus relief.

#### D. *Failure to Investigate, Develop, & Present Mitigating Evidence*

Petitioner argues that if his trial counsel had investigated petitioner's background more thoroughly, said counsel would have discovered "mitigating evidence" establishing (1) petitioner's mother was an emotionally unstable, physically abusive, alcoholic who abused alcohol throughout her pregnancy with petitioner, (2) peti-

tioner weighed only four pounds at birth and required considerable hospital care during his first few weeks of life, (3) for the rest of his life, petitioner suffered the deleterious effects of Fetal Alcohol Syndrome, as well as his mother's physical and emotional abuse, (4) petitioner suffered numerous serious head injuries as a child for which he received little or no medical care due to the neglect of his mother and the absence of his father, (5) petitioner was exposed to alcohol and drug abuse from an early age and began abusing both alcohol and marijuana himself before he reached age twelve, (6) petitioner became involved in street gangs and street crime by age twelve, (7) petitioner experienced a lifetime of adversity, disadvantage, and disability, (8) petitioner attended school irregularly and performed poorly in school, and (9) petitioner suffers from impaired cognitive abilities.

#### 1. *State Court Disposition*

Petitioner first presented this claim to the state courts in his second state habeas corpus application, which the Texas Court of Criminal Appeals dismissed on writ-abuse grounds. *Ex parte Carlos Trevino*, WR-48,153-02, 2005 WL 3119064 (Tex. Crim. App. November 23, 2005).

#### 2. *Procedural Default on Dismissed Claims*

Respondent argues petitioner procedurally defaulted on this multi-faceted claim by failing to present same to the state habeas court during petitioner's first state habeas corpus proceeding, which resulted in the

dismissal of this claim when presented in petitioner's second state habeas corpus application.<sup>57</sup>

a. *Procedural Default Generally*

Procedural default occurs where (1) a state court clearly and expressly bases its dismissal of a claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, or (2) the petitioner fails to exhaust all available state remedies, and the state court to which he would be required to petition would now find the claims procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S. Ct. 2546, 2557 n.1, 115 L. Ed. 2d 640 (1991). In either instance, the petitioner is deemed to have forfeited his federal habeas claim. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S. Ct. 1728, 1734, 144 L. Ed. 2d [468] 1 (1999). Procedural defaults only bar federal habeas review when the state procedural rule that forms the basis for the procedural default was "firmly established and regularly followed" by the time it was applied to preclude state judicial review of the merits of a federal constitutional claim. *Ford v. Georgia*, 498 U.S. 411, 424, 111 S. Ct. 850, 857-58, 112 L. Ed. 2d 935 (1991).

The Fifth Circuit has consistently held that federal habeas review is procedurally barred on claims dismissed by the Texas Court of Criminal Appeals under the Texas writ-abuse statute. *See, e.g., Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006) ("Texas's abuse of the writ doctrine is a valid state procedural bar foreclosing federal habeas review."), *cert. denied*, 549 U.S. 1343 (2007); *Aguilar v. Dretke*, 428 F.3d 526,

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<sup>57</sup> Respondent's Answer, filed June 22, 2009, docket entry no. 82, at pp. 38-40.



533 (5th Cir. 2005) (holding the Texas abuse of the writ rule ordinarily is an adequate and independent procedural ground on which to base a procedural default ruling), *cert. denied*, 547 U.S. 1136 (2006); *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) (holding the violation of the Texas writ-abuse rule ordinarily furnishes an adequate and independent procedural ground which bars federal habeas review of a claim), *cert. denied*, 543 U.S. 1124 (2005); *Busby v. Dretke*, 359 F.3d 708, 724 (5th Cir. 2004) (“the Texas abuse of the writ doctrine is an adequate ground for considering a claim procedurally defaulted.”), *cert. denied*, 541 U.S. 1087 (2004); *Cotton v. Cockrell*, 343 F.3d 746, 755 (5th Cir. 2003) (holding the Texas writ abuse doctrine is an adequate and independent barrier to federal habeas review of unexhausted claims), *cert. denied*, 540 U.S. 1186 (2004).

b. *Exceptions Inapplicable*

The Supreme Court has recognized exceptions to the doctrine of procedural default where a federal habeas corpus petitioner can show “cause and actual prejudice” for his default or that failure to address the merits of his procedurally defaulted claim will work a “fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. at 750, 111 S. Ct. at 2565; *Harris v. Reed*, 489 U.S. 255, 262, 109 S. Ct. 1038, 1043, 103 L. Ed. 2d 308 (1989). To establish “cause,” a petitioner must show either that some objective external factor impeded the defense counsel’s ability to comply with the state’s procedural rules or that petitioner’s trial or appellate counsel rendered ineffective assistance. *Coleman v. Thompson*, 501 U.S. at 753, 111 S. Ct. at 2566; *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986) (holding that proof of inef-



fective assistance by counsel satisfies the “cause” prong of the exception to the procedural default doctrine).

While a showing of ineffective assistance can satisfy the “cause” prong of the “cause and actual prejudice” exception to the procedural default doctrine, petitioner cannot rely upon the allegedly deficient performance or even “ineffective” assistance of his first state habeas corpus counsel as a basis for excusing his failure to present this aspect of his ineffective assistance claims herein to the state courts during petitioner’s first state habeas corpus proceeding. A negligent failure or a malicious refusal by a convicted defendant’s state habeas counsel to present a potentially meritorious claim in the course of the defendant’s state habeas corpus proceeding effectively precludes federal habeas review of that claim, unless the defendant can satisfy the fundamental miscarriage of justice exception to the federal procedural default doctrine. *See Ruiz v. [469] Dretke*, 2005 WL 2146119, \*14 (W.D. Tex. August 29, 2005) (holding a state habeas counsel’s inexplicable failure to assert glaringly obvious grounds for state habeas corpus relief constituted a procedural barrier to federal habeas review of those same unexhausted claims), *affirmed*, 460 F.3d 638 (5th Cir. 2006), *cert. denied*, 549 U.S. 1283 (2007). Infirmities in state habeas corpus proceedings, even those that arise exclusively from the gross incompetence of a petitioner’s state habeas counsel, do not constitute grounds for federal habeas relief and are insufficient to excuse a federal habeas petitioner’s procedural default on a federal constitutional claim. *Ruiz v. Quarterman*, 460 F.3d 638, 644–45 (5th Cir. 2006), *cert. denied*, 549 U.S. 1283 (2007).

In order to satisfy the “miscarriage of justice” test, the petitioner must supplement his constitutional claim with a colorable showing of factual innocence. *Sawyer*

*v. Whitley*, 505 U.S. 333, 335-36, 112 S. Ct. 2514, 2519, 120 L. Ed. 2d 269 (1992). In the context of the punishment phase of a capital trial, the Supreme Court has held that a showing of "actual innocence" is made when a petitioner shows by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found petitioner eligible for the death penalty under applicable state law. *Sawyer v. Whitley*, 505 U.S. at 346-48, 112 S. Ct. at 2523. The Supreme Court explained in *Sawyer v. Whitley* this "actual innocence" requirement focuses on those elements that render a defendant *eligible* for the death penalty and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error. *Sawyer v. Whitley*, 505 U.S. at 347, 112 S. Ct. at 2523. Petitioner has alleged no specific facts satisfying this "factual innocence" standard. Instead petitioner merely cites to a plethora of new, double-edged, mitigating evidence, which he argues was available at the time of petitioner's trial and which might have convinced his jury to answer the final capital sentencing special issue, *i.e.*, the mitigation special issue, in a manner favorable to petitioner.

Even with this additional, potentially mitigating evidence, petitioner would have remained "eligible" for the death penalty because none of this evidence had any potentially mitigating effect with regard to the first two capital sentencing special issues before petitioner's jury. In fact, evidence showing petitioner's virtually life-long criminal history, Fetal Alcohol Syndrome, long history of alcohol and narcotics abuse, as well as petitioner's abused and neglected childhood would likely have solidified the jury's affirmative answer to the first capital sentencing special issue, *i.e.*, the future dangerousness special issue.

Moreover, some of petitioner's purportedly "new" mitigating evidence was cumulative of the evidence already before petitioner's capital sentencing jury. For instance, both Juan Gonzales and Juanita DeLeon testified during the punishment phase of petitioner's trial that petitioner came from a poor family and had been on his own for most of his life.

Finally, petitioner's "new" mitigating evidence does not satisfy the "factual innocence" standard the Supreme Court discussed in *Sawyer v. Whitley*, *supra*, because that evidence focuses almost exclusively on the "mitigation" or *Penry* special issue submitted to the jury at the punishment phase of petitioner's capital murder trial and not on petitioner's "eligibility" for the death sentence.

The Supreme Court explained in *Tuilaepa v. California*, 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994), that the Eighth Amendment addresses two different but related aspects of capital sentencing: the eligibility decision and the selection decision. *Tuilaepa*, 512 U.S. at 971, 114 S. Ct. at 2634. The Supreme Court's analysis of those two aspects of capital sentencing provides a comprehensive system for analyzing Eighth Amendment claims:

To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. The aggravated circumstance may be contained in the definition of the

crime or in a separate sentencing factor (or both). As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague. \* \* \*

We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. "What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.

*Tuilaepa*, 512 U.S. at 971-73, 114 S. Ct. at 2634-35 (citations omitted).

The Supreme Court clearly held in *Tuilaepa* that states may adopt capital sentencing procedures that rely upon the jury, in its sound judgment, to exercise wide discretion. *Tuilaepa*, 512 U.S. at 974, 114 S. Ct. at 2636. The Supreme Court held further, at the *selection* stage, states are not confined to submitting to the jury specific propositional questions but, rather, may direct the jury to consider a wide range of broadly defined factors, such as "the circumstances of the crime," "the defendant's prior criminal record," and "all facts and circumstances presented in extenuation, mitigation,

and aggravation of punishment." *Tuilaepa*, 512 U.S. at 978, 114 S. Ct. at 2638.

In *Loving v. United States*, 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996), the Supreme Court discussed the first part of the *Tuilaepa* analysis, i.e., the eligibility decision, as follows:

The Eighth Amendment requires, among other things, that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Some schemes accomplish that narrowing by requiring that the sentencer find at least one aggravating circumstance. The narrowing may also be achieved, however, in the definition of the capital offense, in which circumstance the requirement that the sentencer "find the existence of the aggravating circumstance in addition is no part of the constitutionally required narrowing process."

*Loving*, 517 U.S. at 755, 116 S. Ct. at 1742 (citations omitted).

The Supreme Court subsequently reaffirmed the vitality of the *Tuilaepa* analysis and elaborated on the distinction between the narrowing function or *eligibility* deci- [471] sion and the *selection* phase of a capital sentencing proceeding in *Buchanan v. Angelone*, 522 U.S. 269, 275-77, 118 S. Ct. 757, 761-62, 139 L. Ed. 2d 702 (1998).

Under Texas law, the *eligibility* decision discussed in *Tuilaepa*, *Loving*, and *Buchanan* occurs at the guilt-innocence phase of trial. See *Johnson v. Texas*, 509



U.S. 350, 362, 113 S. Ct. 2658, 2666, 125 L. Ed. 2d 290 (1993) (recognizing the Texas capital sentencing scheme makes the *eligibility* determination discussed in *Tuilaepa* at the guilt-innocence phase of trial). Thus, petitioner cannot satisfy the “factual innocence” exception to the procedural default doctrine solely by identifying additional mitigating evidence that might have been relevant to the final Texas capital sentencing special issue, i.e., the mitigation special issue. See *Sawyer v. Whitley*, 505 U.S. at 347, 112 S. Ct. at 2523 (the “actual innocence” requirement focuses on those elements that render a defendant *eligible* for the death penalty and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error).

Petitioner’s “new” mitigating evidence fails to establish by clear and convincing evidence that, but for his trial counsel’s failure to more thoroughly investigate petitioner’s background and to develop evidence showing petitioner suffered a childhood of neglect and abuse at the hands of his alcoholic mother, no reasonable juror would have found petitioner *eligible* for the death penalty under applicable state law. *Sawyer v. Whitley*, 505 U.S. at 346–48, 112 S. Ct. at 2523. Petitioner’s “new” mitigating evidence is double-edged in nature. This “new” mitigating evidence tends to reinforce the aggravating aspects of petitioner’s life history, which was already before petitioner’s capital sentencing jury, including the evidence showing petitioner’s early drug and alcohol abuse, trouble in school, early and lengthy participation in criminal conduct, and



unwillingness to conform his behavior to societal norms.<sup>58</sup>

Because petitioner has failed to satisfy the “actual innocence” test set forth in *Sawyer v. Whitley*, he is not entitled to relief from his procedural default under the fundamental miscarriage of justice exception to the procedural default doctrine.

### 3. *No Merits*

Alternatively, this Court independently concludes petitioner’s complaint about his trial counsel’s failure to more thoroughly investigate petitioner’s background and to develop the “new” mitigating evidence identified in petitioner’s pleadings herein fails to satisfy the prejudice prong of the *Strickland* test. In making this conclusion, this Court must re-weigh the totality of petitioner’s proffered mitigating evidence, including petitioner’s “new” mitigating evidence, against the evidence in aggravation. *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 2542 (2003) (“In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.”).

The evidence before the sentencing jury at petitioner’s capital murder trial was summarized in Sections I.E. and III.D.2. above. Petitioner’s “new” mitigating evidence consists of double-edged evidence detailing petitioner’s history of childhood abuse and neglect (both physical and emotional), alcohol and narcotics abuse, spotty attendance and poor performance in

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<sup>58</sup> Petitioner’s juvenile probation officer testified to most of these same matters during the punishment phase of petitioner’s capital murder trial. S.F. Trial, Volume XXIII, testimony of Lorraine Reagan, at pp. 12-36.

school, Fetal Alcohol Syndrome, and ensu- [472] ing tendency to exercise poor judgment. Despite the foregoing, however, petitioner also furnishes a number of affidavits that describe petitioner as a hard-working, non-violent, loving father.<sup>59</sup> This “new” mitigating evidence must also be weighed in the context of the other, uncontradicted, evidence now before this Court, which shows (1) petitioner’s callous comments regarding Salinas before and after her murder (including petitioner’s suggestion that Gonzales should participate in the sexual assault on Salinas and petitioner’s failure to object when Rey and Cervantes suggested the need to eliminate witnesses), (2) petitioner’s participation in the violent assault upon Salinas (*i.e.*, holding her down while others sexually assaulted her), (3) petitioner’s subsequent directive to Gonzales not to talk to police about the incident, (4) petitioner’s nonchalant demeanor immediately following the murder upon his return to the party at the Mata residence, (5) petitioner’s many tattoos reflecting his membership in a notorious prison gang, and (6) the complete and total absence of any indication the petitioner has ever expressed sincere contrition or genuine remorse over Salinas’ murder.

The latter point cannot be over-emphasized. Salinas’ murder was particularly brutal and senseless. Yet petitioner has consistently refused to acknowledge his role in her murder, even to his own trial counsel, claiming instead to have been “too stoned” to remem-

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<sup>59</sup> See, *e.g.*, Affidavits of Juanita Trevino DeLeon, Janet Cruz, Mario Cantu, and Ruben Gonzalez, attached as Exhibits 19, 25, 26, and 27, respectively, to Petitioner’s Amended Petition, filed December 8, 2008, docket entry no. 76.

ber exactly what happened that evening.<sup>60</sup> Petitioner's own affidavit, executed June 11, 2004, contains not even a scintilla of sincere contrition; instead petitioner expresses hostility and blames his trial counsel for allegedly misrepresenting the terms of a proffered plea bargain for a life sentence without accepting any responsibility for his own rejection of the offer after it was accurately described to petitioner.<sup>61</sup>

Absent some indication the petitioner has willingly accepted responsibility for his role in Salinas' brutal rape and murder, the evidence showing petitioner's long history of alcohol and drug abuse, long history of criminal misconduct, and membership in violent street and prison gangs precludes this Court from finding this aspect of petitioner's ineffective assistance claims herein satisfies the prejudice prong of *Strickland*. There is simply no reasonable probability that, but for the failure of petitioner's trial counsel to present petitioner's capital sentencing jury with the additional, double-edged, mitigating evidence now before this Court, the outcome of the punishment phase of petitioner's capital trial would have been different.

#### 4. Conclusion

Petitioner procedurally defaulted on his complaints about his trial counsels' failure to adequately investigate petitioner's background and to develop and present available mitigating evidence by failing to present

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<sup>60</sup> S.F. State Habeas Hearing, testimony of Mario Trevino at pp. 34-38.

<sup>61</sup> Petitioner's Affidavit, attached as Exhibit 16 (Exhibit Volume III) to Petitioner's Amended Petition, filed December 8, 2008, docket entry no. 76.

those same complaints to the state habeas court in the course of petitioner's first state habeas corpus proceeding. None of the exceptions to the procedural default doctrine apply to this aspect of petitioner's ineffective assistance claims herein. Alternatively, petitioner's complaints about his trial counsels' failure to adequately investigate petitioner's back- [473] ground and develop and present mitigating evidence fail to satisfy the prejudice prong of *Strickland*.

E. *Failure to "Meaningfully" Convey Plea Bargain Offer*

Petitioner argues that if his trial counsel had somehow done a better job explaining the prosecution's plea offer, or employed a member of petitioner's family to convince petitioner to accept the life sentence offered by the prosecution, petitioner might have relented and chosen to accept the life sentence offered by the State.<sup>62</sup>

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<sup>62</sup> More specifically, petitioner's affidavit states in pertinent part as follows:

Before my trial started, my attorney Mr. Mario Trevino came to me with a plea bargain for a forty (40) year sentence. He told me that I would have to testify against the others that were also/been [sic] charged with the murder. I did not want to testify.

He later came back to me that [sic] I would not have to testify. He told me that I would still get a forty (40) year sentence.

When we went to the D.A.'s office to sign the paperwork, I saw that it was for a Life sentence, and that I wouldn't be able to see parole until forty (40) years. He told me a life sentence was 30 years.

### 1. *State Court Disposition*

Petitioner first presented this claim to the state courts in his second state habeas corpus application, which the Texas Court of Criminal Appeals dismissed on writ-abuse grounds. *Ex parte Carlos Trevino*, WR-48,153-02, 2005 WL 3119064 (Tex.Crim.App. November 23, 2005).

### 2. *Procedural Default*

For reasons similar to those discussed at length in Section IV.D.2. above, petitioner procedurally defaulted on this aspect of his ineffective assistance claims herein. Petitioner should have included this complaint in his initial state habeas corpus application. The factual and legal bases for these complaints were available to petitioner at the time he filed and litigated his first state habeas corpus proceeding. In fact, petitioner was personally aware of the factual basis for this complaint prior to the commencement of his capital murder trial. Petitioner cannot rely on the alleged incompetence of his first state habeas counsel to excuse his failure to present this complaint during his first

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I was mad with my attorney for not telling me the truth. He wanted to mess me over. I did not trust him. At that point I had only seen him twice.

If my attorney had explained to me the terms of a plea bargain, if he had brought one or more of my family members to explain the fact that being alive for sure was better than risking the chance to get the death penalty, if he had explained that taking the life plea meant that I would be around for my children, my wife and my family, I would have chosen life and would not have gone to trial.

*Id.*



state habeas corpus proceeding. *Ruiz v. Quarterman*, 460 F.3d at 644-45.

Moreover, petitioner's complaint that he got angry with his trial counsel for allegedly misrepresenting the terms of the proffered plea bargain and, thereafter, irrationally refused to accept that offer does not satisfy the "fundamental miscarriage of justice" exception to the procedural default doctrine. Petitioner's own affidavit establishes that, when he arrived at the District Attorney's Office, petitioner was surprised to learn the plea bargain being offered him was for a life sentence with no possibility of parole for forty years.<sup>63</sup> Thus, even if petitioner's trial counsel had previously misrepresented the terms of the plea bargain offered to petitioner, petitioner admits he learned what those terms actually were when he arrived at the District Attorney's Office *before petitioner re-* [474] *jected same*. Simply put, petitioner knew exactly what he would get if he accepted the plea bargain offered, *i.e.*, a life sentence without the possibility of parole for forty years, and the risk he might receive a sentence of death if he proceeded to trial. Petitioner has presented this Court with no specific factual allegations, much less any evidence, establishing petitioner was *non compos mentis* or otherwise mentally incompetent on the date petitioner went to the Office of the Bexar County District Attorney and rejected the plea bargain offered to him. Under such circumstances, it was petitioner's rejection of the plea bargain, rather than any previous mischaracterization of the plea bargain offered by petitioner's trial counsel, that led petitioner to a capital murder trial that resulted in his death sentence.

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<sup>63</sup> *Id.*



### 3. *No Merit*

Alternatively, this Court independently concludes this aspect of petitioner's ineffective assistance claims herein fails to satisfy either prong of *Strickland*. Even assuming petitioner's trial counsel erroneously described to petitioner the details of the plea bargain offered by the prosecution, petitioner admits he was accurately informed of the details of the plea bargain offered to him when petitioner arrived at the District Attorney's Office *before petitioner rejected same*.<sup>64</sup> Thus, petitioner's refusal to accept the plea bargain offered to him cannot be attributed to any deficiency in the performance of petitioner's trial counsel. Furthermore, there was no duty imposed on petitioner's trial counsel to convince or persuade petitioner to accept the favorable terms of the plea bargain petitioner's trial negotiated for petitioner once petitioner was accurately advised of the details of the plea bargain offered by the prosecution. Petitioner's assertion that he did not fully comprehend the consequences of rejecting the life sentence offered by the prosecution in its plea bargain proposal when he chose to reject that offer is incredible. The difference between receiving a life sentence with no chance of parole for at least forty years and receiving a sentence of death is self-evident. The decision to accept or reject the plea bargain in question belonged exclusively to petitioner. He admits he was accurately informed of the details of the plea bargain offer before he rejected same. Petitioner alleges no specific facts showing he was mentally incompetent on the date he rejected the prosecution's offer of a life sentence. Under such circumstances, petitioner's trial

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<sup>64</sup> *Id.*

counsel was not obligated to “explain” the difference between a life sentence and a sentence of death to petitioner.<sup>65</sup>

#### 4. *Conclusion*

Petitioner procedurally defaulted his complaint about his trial counsel’s alleged failure to accurately communicate the plea bargain offered by the prosecution when petitioner failed to raise that same complaint in his original state habeas corpus proceeding. Moreover, petitioner’s complaint fails to satisfy either prong of *Strickland* because petitioner admits he was accurately informed of the details of [475] the plea bargain offered to him prior to the time petitioner rejected same.

#### F. *Failure to Object to Gonzales’ “Damaging” Testimony*

Petitioner argues his trial counsel should have objected on hearsay grounds to the testimony of Juan Gonzales recounting (1) Cervantes’ and Rey’s conversation with petitioner at the crime scene regarding their mutual desire not to leave behind any witnesses and (2) inflammatory statements made by petitioner to Santos Cervantes during the group’s drive back to the Mata residence following Salinas’ murder.

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<sup>65</sup> In his own affidavit, petitioner’s former trial counsel, attorney Mario Trevino, states his impression that petitioner’s change in attitude toward the plea bargained life sentence may have resulted from petitioner receiving directives from petitioner’s prison gang (HPL) not to accept the plea bargain. See Affidavit of Mario Trevino, attached as Exhibit 15 (Exhibits—Volume III) to Petitioner’s Amended Petition, filed December 8, 2008, docket entry no. 76.

### 1. *State Court Disposition*

Petitioner's trial counsel attempted to exclude a portion of the foregoing testimony consisting of petitioner's own oral statements through a pretrial motion<sup>66</sup> but the state trial court ruled against petitioner.<sup>67</sup>

On direct appeal, petitioner raised points of error challenging the admission of portions of this same testimony relating to petitioner's and Cervantes' statements as his third, fourth, and fifth points in appellant's brief. The Texas Court of Criminal Appeals ruled petitioner's and Cervantes' statements in question were not hearsay but, rather, were admissible under applicable state law as admissions of a party-opponent and as adopted admissions. *Trevino v. State*, 991 S.W.2d at 852-53.

Petitioner presented these same ineffective assistance arguments to the state habeas court, albeit in somewhat more obtuse form than herein, as his thirty-fifth through forty-second claims for relief in his original state habeas corpus application.<sup>68</sup> The state habeas trial court concluded all of the testimony of Gonzales about which petitioner complained was admissible and, therefore, there was nothing professionally deficient, nor prejudicial within the meaning of *Strickland*, in the

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<sup>66</sup> On May 15, 1997, petitioner filed a motion to exclude any statements made by the defendant. Trial Transcript, Volume I, at pp. 104-09.

<sup>67</sup> Order of May 22, 1997, found at Trial Transcript, Volume I, at p. 108; S.F. State Habeas Hearing, testimony of Mario Trevino, at pp. 13-14.

<sup>68</sup> State Habeas Transcript in WR-48,153-01, Volume I, at pp. 76-83.

failure of petitioner's trial counsel to object to same.<sup>69</sup> The Texas Court of Criminal Appeals expressly adopted these conclusions when it rejected petitioner's first state habeas corpus application on the merits. *Ex parte Carlos Trevino*, WR-48,153-01 (Tex. Crim. App. April 4, 2001).

## 2. *Synthesis*

Because the state habeas court rejected this portion of petitioner's ineffective assistance claims herein on the merits, this Court's federal habeas review of same is limited by the AEDPA.

Furthermore, the Texas Court of Criminal Appeals' construction of applicable state law during petitioner's first state habeas corpus proceeding (including the state habeas court's conclusion that Gonzales' trial testimony was admissible) binds this Court's federal habeas review of same. See *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S. Ct. 602, 604, 163 L. Ed. 2d 407 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); *Young v. Dretke*, 356 F.3d 616, 628 (5th Cir. 2004) ("In our role as a federal habeas court, we cannot review the correctness of the state [476] habeas court's interpretation of state law.").

The state habeas court concluded, as a matter of state evidentiary law, Gonzales' testimony was admissible. This conclusion binds this Court. *Bradshaw v. Richey*, 546 U.S. at 76, 126 S. Ct. at 604. The failure of petitioner's trial counsel to raise meritless hearsay ob-

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<sup>69</sup> State Habeas Transcript in WR-48,153-01, Volume II, at pp. 92-93.

jections to Gonzales' testimony did not cause the performance of said counsel to fall below an objective level of reasonableness. See *Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002) (holding there was nothing deficient in counsel's failure to object to the admission of psychiatric testimony that was admissible under then-existing precedent), *cert. denied*, 538 U.S. 926 (2003); *Robison v. Johnson*, 151 F.3d 256, 261 (5th Cir. 1998) (nothing deficient regarding trial counsel's failure to seek admission of a document the state court concluded was inadmissible), *cert. denied*, 526 U.S. 1100 (1999); *Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997) (failure to assert a meritless objection cannot be the grounds for a finding of deficient performance), *cert. denied*, 525 U.S. 969 (1998).

Likewise, petitioner was not "prejudiced" within the meaning of *Strickland* by his trial counsel's failure to make a meritless hearsay objection to Gonzales' testimony. See *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999) (holding a complaint about counsel's failure to raise a meritless objection fails to satisfy the prejudice prong of *Strickland* because the failure to make a meritless objection has no impact on the outcome of the proceeding).

### 3. Conclusion

The Texas Court of Criminal Appeals' rejection on the merits of petitioner's complaints about the failure of his trial counsel to object on hearsay grounds to Juan Gonzales' testimony at both phases of petitioner's capital murder trial was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor based on an unreasonable determination of the facts in light of the evidence presented in



the petitioner's state habeas corpus proceeding. Petitioner's sixth claim herein does not warrant federal habeas relief under the AEDPA.

### V. *Quasi-Atkins Claim*

#### A. *The Claim*

In his fourth claim herein, petitioner argues he suffers from developmental disabilities and permanent cognitive disabilities resulting from fetal Alcohol Syndrome Disorder sufficiently analogous to mental retardation so as to render him constitutionally ineligible for the death penalty under the legal principles discussed in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (holding the Eighth Amendment precludes the execution of mentally retarded capital murderers).<sup>70</sup>

#### B. *State Court Disposition*

Petitioner presented his claim seeking an expansion of the holding in *Atkins* beyond mentally retarded capital murderers to any capital murderer who suffers from Fetal Alcohol Syndrome to the state courts for the first time in his second state habeas corpus application. The Texas Court of Criminal Appeals dismissed petitioner's second state habeas corpus application as an abuse of the writ. *Ex parte Carlos Trevino*, WR-48-153-02, 2005 WL 3119064 (Tex. Crim. App. November 23, 2005).

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<sup>70</sup> Petitioner's Amended Petition, at pp. 40-44.



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### C. *Procedural Default*

Respondent correctly points out the dismissal of this claim on state procedural grounds in the course of petitioner's second state habeas corpus proceeding constitutes a barrier to federal habeas review of same. *Coleman v. Thompson*, 501 U.S. at 735 n.1, 111 S. Ct. at 2557 n.1. "Petitioner's failure to comply with the Texas writ-abuse statute constitutes an independent and adequate ground for dismissal of a claim for federal habeas relief. Federal habeas review is procedurally barred on claims dismissed by the Texas Court of Criminal Appeals under the Texas writ-abuse statute. See *Coleman v. Quarterman*, 456 F.3d at 542 ("Texas's abuse of the writ doctrine is a valid state procedural bar foreclosing federal habeas review."); *Aguilar v. Dretke*, 428 F.3d at 533 (holding the Texas abuse of the writ rule ordinarily is an adequate and independent procedural ground on which to base a procedural default ruling). Petitioner has not alleged sufficient specific facts to satisfy either the "cause and actual prejudice" or "fundamental miscarriage of justice" exceptions to the procedural default doctrine.

### D. *Teague Foreclosure*

#### 1. *In General*

Moreover, respondent also correctly points out adoption of the new rule advocated by petitioner herein, i.e., expansion of the holding in *Atkins* to include capital murderers who suffer from Fetal Alcohol Syndrome, is barred by the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075, 103 L. Ed. 2d 334 (1989) (foreclosing adoption of a new constitutional rule in a federal habeas corpus pro-

ceeding or other collateral review). Under the holding in *Teague*, federal courts are generally barred from applying new constitutional rules of criminal procedure retroactively on collateral review. *Caspari v. Bohlen*, 510 U.S. 383, 389-90, 114 S. Ct. 948, 953, 127 L. Ed. 2d 236 (1994). A “new rule” for *Teague* purposes is one that was not dictated by precedent existing at the time the defendant’s conviction became final. *See O’Dell v. Netherland*, 521 U.S. 151, 156, 117 S. Ct. 1969, 1973, 138 L. Ed. 2d 351 (1997) (holding a “new rule” either “breaks new ground,” “imposes a new obligation on the States or the Federal Government,” or was not “dictated by precedent existing at the time the defendant’s conviction became final”). Under this doctrine, unless reasonable jurists hearing the defendant’s claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor, a federal habeas court is barred from doing so on collateral review. *Id.*

The holding in *Teague* is applied in three steps: first, the court must determine when the petitioner’s conviction became final; second, the court must survey the legal landscape as it then existed and determine whether a state court considering the petitioner’s claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution; and third, if the rule advocated by the petitioner is a new rule, the court must determine whether the rule falls within one of the two narrow exceptions to the non-retroactivity principle. *Caspari v. Bohlen*, 510 U.S. at 390, 114 S. Ct. at 953..

*Teague* remains applicable after the passage of the AEDPA. *See Horn v. Banks*, 536 U.S. 266, 268-72, 122 S. Ct. 2147, 2148-51, 153 L. Ed. 2d 301 (2002) (applying

*Teague* in an AEDPA context); *Robertson v. Cockrell*, 325 F.3d 243, 255 (5th Cir.) (recognizing the continued vitality of the *Teague* non-retroactivity doctrine under the AEDPA), *cert. denied*, 539 U.S. 979 (2003).

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## 2. *Finality of Petitioner's Conviction & Sentence*

A conviction becomes final for *Teague* purposes when either the United States Supreme Court denies a certiorari petition on the defendant's direct appeal or the time period for filing a certiorari petition expires. *Caspari v. Bohlen*, 510 U.S. at 390, 114 S. Ct. at 953. Petitioner's conviction became final for *Teague* purposes not later than August 11, 1999, i.e., the ninety-first day after the Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence on direct appeal and the date the deadline for the filing of petitioner's petition for writ of certiorari with the United States Supreme Court expired. *Beard v. Banks*, 542 U.S. 406, 411-12, 124 S. Ct. 2504, 2510, 159 L. Ed. 2d 494 (2004) (recognizing a state criminal conviction ordinarily becomes final for *Teague* purposes when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for writ of certiorari has elapsed or a timely filed petition for certiorari has been denied); *Caspari v. Bohlen*, 510 U.S. at 390, 114 S. Ct. at 953 ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."); 21 U.S.C. § 2101(d) (the deadline for filing a certiorari petition from a state criminal conviction shall be established by Supreme Court rule); Sup. Ct. Rule 13.1 (setting the deadline for

the filing of a certiorari petition at 90 days from the date of the state court judgment for which review is sought).

### 3. *Surveying the Legal Landscape as of that Date*

As of the date petitioner's conviction and sentence became final for *Teague* purposes, no federal court had ever held a convicted capital murderer was constitutionally exempt from the death penalty because he or she suffered from the deleterious effects of Fetal Alcohol Syndrome. Nor had any federal court held Fetal Alcohol Syndrome to be the legal equivalent of "mental retardation," as that term was defined in *Atkins*. Thus, the rule advocated by petitioner constitutes a "new rule" within the meaning of *Teague*.

### 4. *Exceptions Inapplicable*

#### a. *The Recognized Exceptions*

The remaining question for this Court is whether the new rule advocated by petitioner falls within either of the two recognized exceptions to the *Teague* barrier. The only two exceptions to the *Teague* non-retroactivity doctrine are reserved for (1) new rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendants because of their status or offense and (2) "watershed" rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, *i.e.*, a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty. *O'Dell v. Netherland*, 521 U.S. at 157, 117 S. Ct. at 1973.

b. *Nothing Implicit in the Concept of Ordered Liberty*

The new rule advocated by petitioner herein does not fall within the parameters of the second exception to the *Teague* non-retroactivity. Petitioner's fetal alcohol syndrome did not implicate the fundamental fairness of petitioner's capital murder trial. Moreover, petitioner's own expert reports the extent of petitioner's "fetal alcohol syndrome" (FAS) or fetal alcohol effect (FAE) do not indicate the presence [479] of mental retardation or appear to have significantly interfered with petitioner's ability to either (1) know right from wrong, (2) appreciate the nature and quality of his actions at the time of his capital offense, or (3) refrain from any activities that resulted in his capital murder conviction.<sup>71</sup>

c. *A New Categorical Rule Unwarranted*

The new rule advocated by petitioner herein, i.e., a categorical exclusion of the death penalty for offenders who suffer from fetal alcohol syndrome, would fall within the category of rules recognized in the first exception to the *Teague* foreclosure doctrine. However, extending the holding in *Atkins* to persons such as petitioner who suffer from fetal alcohol syndrome does not appear to be warranted by the same considerations that led to the adoption of the rule in *Atkins*.

In its landmark opinion in *Atkins v. Virginia*, the United States Supreme Court listed several reasons why it believed carving out a categorical exception

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<sup>71</sup> Report of Dr. Rebecca A. Dryer, attached as Exhibit 24 (Exhibits Volume V) to Petitioner's Amended Petition, filed December 8, 2008, docket entry no. 76, at p. 17 of 18.



from execution for mentally retarded capital murderers was warranted: (1) there appeared to be a developing consensus among the state legislatures that executing mentally retarded murderers was inappropriate; (2) there was serious question as to whether the justifications for capital punishment—retribution and deterrence of capital crimes by prospective offenders—possessed any efficacy vis-a-vis the mentally retarded who, by virtue of their mental impairment, possessed diminished capacities to understand and process information, communicate, abstract from mistakes and learn from experience, engage in logical reasoning, control their impulses, and understand the reactions of others; and (3) the reduced capacity of mentally retarded offenders necessarily meant such offenders faced an increased risk the death penalty would be imposed in spite of factors that may have called for a less severe penalty, i.e., the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation owing to their diminished ability to meaningfully assist defense counsel and testify effectively on their own behalf and their unexpressive demeanor, which might create an unwarranted impression of lack of remorse. *Atkins v. Virginia*, 536 U.S. at 311-21, 122 S. Ct. at 2246-52.

Petitioner has presented this Court with no fact-specific allegations, much less any evidence, showing either (1) there is a developing national consensus among legislative bodies rejecting the efficacy of execution for capital murderers who suffer from fetal alcohol syndrome; (2) offenders who suffer from fetal alcohol syndrome, as a group, necessarily possess diminished capacities to understand and process information, communicate, abstract from mistakes and learn from experience, engage in logical reasoning, control their



impulses, and understand the reactions of others; or (3) offenders who suffer from fetal alcohol syndrome necessarily face the same or similar increased risk the death penalty will be imposed in spite of factors that may have called for a less severe penalty as do mentally retarded offenders. In short, petitioner has not presented this Court with any evidence establishing an individual suffering from fetal alcohol syndrome or fetal alcohol effects necessarily suffers the same type of debilitating and mitigating effects as an individual who suffers from mental retardation. While fetal alcohol syndrome is often associated with mental retardation, there is no evidence before this Court establishing an equivalency between fetal al- [480] cohohol syndrome and mental retardation in terms of the inability of an individual suffering from fetal alcohol syndrome to recognize the "wrongness" of his or her own conduct, learn from his or her mistakes, or conform his or her conduct to societal norms. Thus, there is no evidentiary basis now before this Court justifying the adoption of an *Atkins*-like categorical ban on the execution of capital murderers who suffer from fetal alcohol syndrome.

#### E. Conclusion

Petitioner procedurally defaulted on his argument that the holding in *Atkins* should be extended to include offenders who suffer from fetal alcohol syndrome. Moreover, the Supreme Court's holding in *Teague v. Lane* precludes this Court from adopting the new rule advocated by petitioner in the context of this federal habeas corpus proceeding. Accordingly, petitioner's fourth claim herein does not warrant federal habeas corpus relief.

## ***VL Failure to Hold Hearing on Motion for New Trial***

### ***A. The Claim***

In his fifth claim herein, petitioner complains the state trial court failed to hold an evidentiary hearing in conjunction with its denial of petitioner's motion for new trial, which was based on arguments that (1) petitioner was prevented from properly conducting voir dire due to the trial court's refusal to permit petitioner's trial counsel to re-question eleven members of the jury venire panel about their views on scientific evidence and (2) the state trial court erred in denying petitioner's motion for continuance.<sup>72</sup> Petitioner attempts to couch these complaints in the form of a constructive ineffective assistance claim.

### ***B. State Court Disposition***

To fully understand petitioner's fifth claim herein, it is necessary to return to the voir dire phase of petitioner's trial.

On June 17, 1997, after more than two weeks of individual voir dire, the prosecution advised petitioner's trial counsel for the first time that it had DNA blood typing that matched petitioner's blood to an item of evidence (Salinas' panties) found at the crime scene.<sup>73</sup>

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<sup>72</sup> Petitioner's Amended Petition, at pp. 45-48.

Petitioner's motion for new trial, filed in petitioner's state trial court on July 25, 1997, appears at Supplemental Trial Transcript, at pp. 4-9.

<sup>73</sup> S.F. Trial, Volume XV, at p. 3.

The following day, on June 18, 1997, petitioner's trial counsel advised the state trial court of this fact and requested the trial court appoint an expert to assist petitioner's defense team in its trial preparations, which request the trial court granted.<sup>74</sup> After a brief return to individual voir dire, petitioner's trial counsel explained to the state trial court that they had relied during their previous individual voir dire on numerous representations by the prosecution that no DNA testing existed that linked the petitioner to any physical evidence and, therefore, they had failed to question the venire members about their views on scientific evidence.<sup>75</sup> Petitioner's trial counsel then moved for a mistrial based on their inability to voir dire the jury venire members who had already undergone voir dire examination on their views of scientific evidence.<sup>76</sup> The state trial court denied defense counsel's motion [481] for mistrial.<sup>77</sup> Petitioner's trial counsel then advised the trial court they had secured the services of an independent DNA-testing facility to check the findings of the prosecution's DNA expert and the trial court indicated its satisfaction with the funding request and time-frame for re-testing suggested by petitioner's trial counsel.<sup>78</sup>

Also on June 18, 1997, petitioner's trial counsel filed formal motions for continuance and for appointment of

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<sup>74</sup> *Id.*, at pp. 3-4.

<sup>75</sup> *Id.*, at pp. 33-34.

<sup>76</sup> *Id.*, at p. 35.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*, at pp. 35-40.

a DNA-expert to assist the defense team.<sup>79</sup> The state trial court denied petitioner's motion for continuance but granted petitioner's motion requesting appointment of a DNA-expert to assist the defense team.<sup>80</sup>

The following day, June 19, 1997, the guilt-innocence phase of petitioner's capital murder trial commenced.

On July 25, 1997, a little more than three weeks after the conclusion of petitioner's capital murder trial, petitioner's trial counsel filed a motion for new trial, which provided, in pertinent part, as follows:

A. Defendant was denied effective assistance of counsel during voir dire. The right to be represented by counsel includes counsel's right to question the members of the jury panel to intelligently exercise peremptory challenges. Defendant's trial counsel was denied the opportunity to question and discover jurors' views on an issue applicable to the case, to wit: scientific evidence/DNA. During pre-trial hearing Defendant's trial counsel was [sic] informed by the State that no DNA evidence connecting this defendant to the crime had been found and that there was no DNA evidence to be used in Defendant's trial. After 11 jurors had been accepted by defendant to hear this case, the State informed Defendant's counsel that DNA blood testing conducted on the victim's panties did in fact connect this defendant to the crime.

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<sup>79</sup> Trial Transcript, Volume II, at pp. 133-42.

<sup>80</sup> Trial Transcript, Volume II, at pp. 136 & 140-41.

B. The Court erred in denying defendant's Motion for Continuance. After the jury had been selected but prior to the jury being sworn, defendant's trial counsel moved for a continuance based on the facts related above. Consequently, defendant was denied effective assistance of counsel because he was forced to proceed to trial without adequate preparation to cross[-]examine the state's expert witness [on] his DNA testing procedure and the results of his DNA testing.<sup>81</sup>

The state trial court held no hearing on petitioner's motion for new trial. It was subsequently denied as a matter of law.

On direct appeal, petitioner's first point of error argued the state trial court's denial of petitioner's motion for mistrial had improperly denied petitioner the opportunity to inquire during voir dire regarding the venire members' views regarding scientific evidence, including DNA blood evidence.<sup>82</sup> In its opinion affirming petitioner's conviction and sentence, the Texas Court of Criminal Appeals rejected this argument on the merits, finding as follows:

The State asserts that before jury selection, it had informed appellant that though they had not discovered any incriminating DNA evidence, DNA testing [482] was being conducted and that results had at that point not been prejudicial. But according to the State, it also

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<sup>81</sup> Supplemental Trial Transcript, at pp. 4-5.

<sup>82</sup> Appellant's Brief, at pp. 2-10.

informed appellant that it was conducting further testing on an article of the victim's clothing. That appellant had this information is confirmed by his own arguments when he moved for mistrial.

*Trevino v. State*, 991 S.W.2d at 851. The Texas Court of Criminal Appeals found and concluded further:

In presenting his claim to the trial court, appellant's counsel admitted that the State had informed him before jury selection of its continuing DNA tests on the victim's clothing. Counsel admitted that since none of the DNA testing had been incriminating, he decided to "let it go." Counsel's decision not to query the venire regarding DNA evidence was a strategic decision and the product of neither prosecutorial misconduct nor trial court error. Under these facts, we cannot hold that the trial court abused its discretion in denying appellant's motion. Appellant's first point of error is overruled.

*Trevino v. State*, 991 S.W.2d at 851 (citation omitted).

In his thirty-second claim for relief in his original state habeas corpus application, petitioner argued his trial counsel rendered ineffective assistance by (1) failing to adequately prepare a defense to the DNA evidence and (2) agreeing to the appointment of a defense DNA-expert while trial was underway.<sup>83</sup> Petitioner argued further that "prejudice" within the meaning of *Strickland* had to be presumed because his trial counsel had "admitted" in petitioner's motion for new trial to

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<sup>83</sup> State Habeas Transcript, Volume I, at pp. 65-68.



having rendered ineffective assistance, thereby creating "an inherent conflict," and the state trial court thereafter failed to appoint substitute counsel to represent petitioner *sua sponte*.<sup>84</sup>

Petitioner's co-counsel at trial, attorney Mario Trevino, testified during petitioner's state habeas corpus proceeding, in pertinent part, that (1) he argued ineffective assistance of counsel in petitioner's motion for new trial because he believed he had been improperly prevented from examining the jury venire during voir dire regarding their views on DNA evidence, (2) the initial DNA test results were beneficial to petitioner, (3) the DNA tests results on the victim's clothing that came back on the eve of trial did link petitioner to the crime, (4) he put all the justifications for a mistrial into the record when he made that motion, (5) he was aware of no evidence relating to his motion for mistrial that could have been presented to further bolster that motion, (6) when he was advised by the prosecution at the start of voir dire that additional DNA testing was being done on some "spots" found on the victim's clothing, he discussed with petitioner the possibility of moving for a continuance but petitioner insisted there was no possibility any of the new test results would link him to the offense, (7) based on petitioner's representations, defense counsel chose to proceed with voir dire rather than move for a continuance at that point, (8) he was aware of no evidence suggesting any of the prosecution's DNA evidence introduced during petitioner's trial was inaccurate, (9) he only filed a motion for new trial urging ineffective assistance to "preserve error" on such a claim in case he had made a mis-

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<sup>84</sup> *Id.*, at pp. 67-68.

take, and (10) in hindsight, his only mistake was in relying upon petitioner's assurances there was "no way" petitioner's DNA was going to be found on the victim's [483] clothing.<sup>85</sup> Petitioner presented the state habeas court with no evidence establishing there was anything inaccurate in the prosecution's trial testimony regarding the DNA test results obtained from Salinas' panties, i.e., the testimony showing neither Salinas nor petitioner could be eliminated as a possible source of the mixed blood sample found on Salinas' panties.

The state habeas trial court construed petitioner's thirty-second claim as a complaint that petitioner's trial counsel had been ineffective for failing to adequately prepare to cross-examine the prosecution's DNA expert and concluded (1) petitioner's trial counsel obtained the assistance of a DNA expert, (2) petitioner's trial counsel were unaware of any evidence showing the prosecution's DNA expert's conclusions were incorrect, (3) the DNA test results obtained by the prosecution's expert were not inconsistent with the account of the victim's murder petitioner related to his trial counsel, (4) there was no evidence suggesting there was anything inaccurate in the prosecution's DNA expert's trial testimony, and (5) therefore, petitioner had failed to satisfy either prong of the *Strickland* test.<sup>86</sup> The Texas Court of Criminal Appeals adopted these findings and conclusions when it rejected petitioner's first state habeas corpus application. *Ex parte Carlos Trevino*, WR-48,153-01 (Tex. Crim. App. April 4, 2001).

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<sup>85</sup> S.F. State Habeas Hearing, testimony of Mario Trevino, at pp. 6-8, 46-51, 54-55.

<sup>86</sup> State Habeas Transcript, Volume II, at p. 91.

### C. *Synthesis*

The state habeas court reasonably concluded petitioner's complaints about his trial counsel's performance in connection with the prosecution's DNA evidence failed to satisfy either prong of *Strickland*.

#### 1. *No Deficient Performance*

In determining to proceed with voir dire while the prosecution was still analyzing DNA samples from Salinas' clothing, petitioner's trial counsel reasonably relied upon petitioner's assurances his DNA would not be found on any of her clothing. This reliance was reasonable in light of the fact none of the prosecution's earlier DNA tests had found any incriminating evidence. As soon as petitioner's trial counsel were made aware of the incriminating evidence linking petitioner's blood to Salinas' panties, said counsel immediately moved for mistrial, a continuance, and appointment of their own DNA expert. Petitioner does not allege any facts showing it was unreasonable for said counsel to wait until that date to make any of those motions. The state appellate court reasonably found the failure of petitioner's trial counsel to voir dire petitioner's jury venire on their views of DNA evidence was a strategic decision based on the absence, to that date, of any DNA evidence in the record linking the petitioner to the crime. Petitioner's trial counsel timely filed a motion for new trial once more complaining about their inability to voir dire the jury venire regarding DNA evidence but there is no evidence showing that strategic decision was objectively unreasonable. In so doing, petitioner's trial counsel properly preserved for state appellate review petitioner's complaint about the denial of his motion for mistrial.

Moreover, petitioner's trial counsel cross-examined the prosecution's DNA expert extensively, obtaining concessions that the mixed blood stain in question could have come from more than two sources and it was unclear when that stain was deposited on Salinas' panties.<sup>87</sup> Petitioner does not identify any further questions his trial counsel should have directed to the prosecution's DNA expert.

Petitioner alleged no facts before the state habeas court, much less furnished that court with any evidence, showing either petitioner's trial counsel (1) knew or had reason to suspect at the start of voir dire that any incriminating DNA evidence would appear, (2) had any reasonable basis for requesting the assistance of a DNA expert prior to their being notified of the possible presence of the petitioner's blood on Salinas' panties, (3) were ever aware of any facts or evidence showing there was anything erroneous or inaccurate about the prosecution's DNA expert's testimony that Salinas and the petitioner could not be excluded as possible sources of the mixed blood stain found on Salinas' panties, or (4) failed to ask any pertinent or relevant questions of the prosecution's DNA expert on cross-examination of that witness. Under such circumstances, there was nothing objectively unreasonable with the determination by the state habeas court that petitioner's complaints about his trial court's conduct vis-a-vis the prosecution's DNA evidence failed to satisfy the first prong of *Strickland*.

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<sup>87</sup> S.F. Trial, Volume XXII, testimony of Lonnie Ginsberg, at pp. 4-46.

## 2. *No Prejudice*

Moreover, because petitioner failed to present the state habeas court with evidence showing there was anything erroneous or inaccurate about the prosecution's DNA evidence inferentially linking petitioner's blood to Salinas' panties, the state habeas court reasonably concluded petitioner also failed to satisfy the prejudice prong of *Strickland*.

Petitioner has failed to allege any facts before the state habeas court, much less furnish that court with any evidence, showing how he was "prejudiced" within the meaning of *Strickland* by his trial counsels' failure to voir dire the jury venire on their views of DNA evidence. Petitioner's presence at the crime scene, established through the uncontradicted testimony of petitioner's own cousin, was hardly a subject of rational debate throughout petitioner's trial. Gonzales' testimony that he saw both Cervantes and the petitioner with blood on them following Salinas' murder is consistent with the prosecution's DNA test results, as it affords a rational explanation for how a mixture of possibly Salinas' and the petitioner's blood might have been found on Salinas' panties, which were found some distance from her body, even if one assumes the petitioner did not personally sexually assault Salinas. Gonzales testified Salinas' underwear had been removed by a person or persons unknown before he and the petitioner ever arrived on the scene to witness her sexual assault by Cervantes.<sup>88</sup> Gonzales denied that the peti-

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<sup>88</sup> S.F. Trial, Volume XIX, testimony of Juan Gonzales, at p. 27.



tioner ever removed any of Salinas' clothing.<sup>89</sup> In sum, the DNA test results at petitioner's trial were not critical to the outcome of petitioner's trial; rather, they represented little more than corroborative evidence regarding Gonzales' otherwise uncontradicted, unchallenged, testimony placing the petitioner at the scene where Salinas was sexually assaulted and murdered.

Moreover, petitioner alleges no facts showing there were any questions his trial counsel could have asked the prosecution's DNA expert that would have undermined his credibility, or otherwise impeached his conclusions.

[485] Even at this late date, petitioner has alleged no facts, much less furnished this Court with any evidence, showing the prosecution's DNA expert testified falsely or in any manner inaccurately in describing the DNA test results on the mixed blood sample found on Salinas' panties. Thus, even assuming petitioner's trial counsel should have disregarded petitioner's assurances and requested the assistance of a DNA expert much earlier than said counsel did so or asked additional questions of the prosecution's DNA expert on cross-examination, petitioner has alleged no facts, and furnished no evidence, showing a reasonable probability that, but for either of those failures, the outcome of either phase of petitioner's capital murder trial would have been different.

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<sup>89</sup> *Id.*, at p. 28.



### 3. *No Presumption of Prejudice in re Motion for New Trial*

Petitioner attempts to circumvent the dearth of facts or evidence showing he was “prejudiced” within the meaning of *Strickland* or entitled to a presumption of prejudice because his trial counsel filed a motion for new trial in which said counsel confessed his own ineffectiveness and the state trial court allowed that motion to be denied as a matter of law by the passage of time without appointing a new counsel to represent petitioner at an evidentiary hearing.<sup>90</sup> These arguments are without merit for at least three reasons.

#### a. *Strickland’s First Prong is Objective*

First, as explained above, the *Strickland* test’s first prong focuses on the *objective* reasonableness of counsel’s conduct, not on said counsel’s *ex post facto*, subjective beliefs about the efficacy of his or her own conduct. A convicted defendant must show that counsel’s representation “fell below an objective standard of reasonableness.” *Wiggins v. Smith*, 539 U.S. at 521, 123 S. Ct. at 2535; *Williams v. Taylor*, 529 U.S. at 390-91, 120 S. Ct. at 1511. In so doing, a convicted defendant must carry the burden of proof and overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. at 687-91, 104 S. Ct. at 2064-66. Courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight. See *Wiggins v. Smith*, 539 U.S. at 523, 123 S. Ct. at 2536 (holding the proper analysis under the first

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<sup>90</sup> Petitioner Amended Petition, at pp. 47-48.

prong of *Strickland* is an objective review of the reasonableness of counsel's performance under prevailing professional norms which includes a context-dependent consideration of the challenged conduct as seen from the perspective of said counsel at the time).

Given the circumstances as described by petitioner's trial counsel during his uncontradicted testimony at petitioner's state habeas corpus hearing, there was nothing *objectively unreasonable* about the failure of petitioner's trial counsel to either (1) voir dire the jury venire regarding their views on the efficacy of DNA evidence, (2) make a request for the appointment of a DNA expert to assist the defense team earlier than counsel did, (3) move for a continuance earlier than counsel did, or (4) further cross-examine the prosecution's DNA expert. Until June 17, 1997, petitioner's trial counsel had no rational basis to believe there would be any incriminating DNA evidence presented at petitioner's trial. Under such circumstances, there was nothing *objectively unreasonable* with the decision by petitioner's trial counsel to forego voir dire questions inquiring into the potential jurors' views of DNA evidence. Petitioner's trial counsel cannot [486] be faulted for failing to foresee prior to the commencement of voir dire that petitioner's blood would be found in a mixed sample on Salinas' panties. See *Sharp v. Johnson*, 107 F.3d 282, 290 n.28 (5th Cir. 1997) ("clairvoyance is not a required attribute of effective representation"); *Garland v. Maggio*, 717 F.2d 199, 207 (5th Cir. 1983) (same).

b. *No Presumption of Prejudice Applicable*

Second, there is no clearly established federal law mandating a presumption of prejudice in circumstances such as petitioner's case. The Supreme Court has recognized a "presumption of prejudice" or waived the sat-

isfying the prejudice prong of *Strickland* in only two narrow categories of cases, neither of which applies to petitioner's case.

(1) *Cuyler v. Sullivan Inapplicable*

The Sixth Amendment right to counsel includes the right to representation that is free from any conflict of interest. *United States v. Garcia-Jasso*, 472 F.3d 239, 243 (5th Cir. 2006); *United States v. Vasquez*, 298 F.3d 354, 360 (5th Cir. 2002), *cert. denied*, 537 U.S. 1024 (2002); *United States v. Vaquero*, 997 F.2d 78, 89 (5th Cir. 1993), *cert. denied*, 510 U.S. 1016 (1993). A conflict of interest exists when defense counsel places himself in a position conducive to divided loyalties. *United States v. Vasquez*, 298 F.3d at 360; *United States v. Vaquero*, 997 F.2d at 89.

"In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718, 64 L. Ed. 2d 333 (1980); *United States v. Infante*, 404 F.3d 376, 390-91 (5th Cir. 2005); *Ramirez v. Dretke*, 396 F.3d 646, 649 (5th Cir. 2005); *United States v. Salado*, 339 F.3d 285, 291 (5th Cir. 2003). The *Cuyler* standard differs substantially from the *Strickland* test in that *Cuyler* requires no showing of "prejudice." See *Strickland v. Washington*, 466 U.S. at 692, 104 S. Ct. at 2067 (recognizing prejudice is presumed under the *Cuyler* test only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."); *United States v. Newell*, 315 F.3d 510, 516 (5th Cir. 2002) ("When a defendant has been able to show that his counsel 'actively repre-

sented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance,' constitutional error has occurred and prejudice is inherent in the conflict."); *Perillo v. Johnson*, 205 F.3d 775, 781 (5th Cir. 2000) (discussing the distinction between the *Cuyler* and *Strickland* tests).

Under the *Cuyler* test, an "actual conflict" exists when defense counsel is compelled to compromise his duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client. *Perillo v. Johnson*, 205 F.3d at 781. A defendant must show more than a speculative or potential conflict. *United States v. Garcia-Jasso*, 472 F.3d at 243; *United States v. Infante*, 404 F.3d at 391. The defendant must demonstrate that his counsel made a choice between possible alternative courses of action; if he did not make such a choice, the conflict remained hypothetical. *United States v. Garcia-Jasso*, 472 F.3d at 243. The mere possibility of a conflict, absent a showing that the attorney actively represented conflicting interests, is not sufficient. *Cuyler v. Sullivan*, 446 U.S. at 350, 100 S. Ct. at 1719 ("But until a defendant shows that [487] his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance."); *United States v. Villarreal*, 324 F.3d 319, 327 (5th Cir.2003).

"An adverse effect on counsel's performance may be shown with evidence that counsel's judgment was actually fettered by concern over the effect of certain trial decisions on other clients." *United States v. Infante*, 404 F.3d at 393; *Perillo v. Johnson*, 205 F.3d at 807. The defendant must establish adverse effect by demonstrating there was some plausible alternative defense strategy that could have been pursued, but was

not, because of the actual conflict. *United States v. Infante*, 404 F.3d at 393; *Perillo v. Johnson*, 205 F.3d at 781; *Beathard v. Johnson*, 177 F.3d 340, 345 (5th Cir. 1999), *cert. denied*, 528 U.S. 954 (1999). “A conflict of interest is present ‘whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing.’” *Ramirez v. Dretke*, 396 F.3d at 650. “An actual conflict of interest exists if counsel’s introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing.” *United States v. Salado*, 339 F.3d at 291; *United States v. Rico*, 51 F.3d 495, 509 (5th Cir. 1995), *cert. denied*, 516 U.S. 883 (1995).

In *Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995) (*en banc*), *cert. denied*, 517 U.S. 1157 (1996), the Fifth Circuit rejected a broad-ranging application of the *Cuyler* standard to complaints of ineffective assistance arising from alleged conflicts of interest by defense counsel. See *Beets v. Scott*, 65 F.3d at 1268 (holding that not every potential conflict, even in multiple client representation cases, is an “actual conflict” for Sixth Amendment purposes). Subsequently, the Fifth Circuit has consistently refused to apply the *Cuyler* test outside the context of multiple representation situations. See, e.g., *United States v. Garza*, 429 F.3d 165, 172 (5th Cir. 2005) (“*Cuyler* only applies where an attorney was effectively, if not technically, representing multiple clients in the same proceeding.”), *cert. denied*, 546 U.S. 1220 (2006); *United States v. Newell*, 315 F.3d at 516 (holding *Strickland* “more appropriately gauges an attorney’s alleged conflict of interest arising not from multiple client representation but from a conflict



between the attorney's personal interest and that of his client"); *Perillo v. Johnson*, 205 F.3d at 781 ("An 'actual conflict' exists when defense counsel is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client.").

Petitioner alleges no specific facts sufficient to bring his case within the conflict of interest line of cases following *Cuyler*. At best, petitioner's trial counsel filed a motion for new trial in which said counsel urged a ground for relief phrased in terms of constructive ineffective assistance of counsel but which actually was an attack upon the state trial court's denial of petitioner's motion for mistrial. Petitioner's complaints about the performance of his trial counsel during jury selection do not satisfy either the "actual conflict" or "adverse effect" requirements of the narrow *Cuyler* exception to the *Strickland* standard. Thus, this line of cases has no application to petitioner's situation.

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## (2) *United States v. Cronic Inapplicable*

In *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), the Supreme Court held that a presumption of prejudice similar to that recognized in *Cuyler* arises in three narrow circumstances: first, when a criminal defendant is completely denied the assistance of counsel; second, when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and finally, where the circumstances are such that even competent counsel very likely could not render effective assistance. *United States v. Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047. As examples of the latter two situations, respectively, the Supreme



Court cited the denial of effective cross-examination in *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347 (1974) (defendant was denied the opportunity to cross-examine the prosecution's key witness for bias), and the incendiary circumstances surrounding the trial of the so-called "Scottsboro Boys" addressed in *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932) (no individual attorney was appointed to represent the defendants and trial proceeded after a volunteer attorney from another state appeared on the first day of trial but confessed he had not had an opportunity to prepare for trial). *United States v. Cronic*, 466 U.S. at 659-61, 104 S. Ct. at 2047-48.

In *Bell v. Cone*, 535 U.S. 685, 695-96, 122 S. Ct. 1843, 1851, 152 L. Ed. 2d 914 (2002), the Supreme Court reiterated that the second exception to the requirement of *Strickland* "prejudice" it had envisioned in *Cronic* was limited to situations in which defense counsel *completely* failed to subject the prosecution's case to meaningful adversarial testing. *See Bell v. Cone*, 535 U.S. at 697-98, 122 S. Ct. at 1851-52 (holding complaints about trial counsel's waiver of closing argument at the punishment phase of trial and failure to adduce mitigating evidence insufficient to create a presumption of prejudice absent a showing trial counsel completely failed to challenge the prosecution's case throughout the sentencing proceeding).

The presumption of prejudice recognized in *Cronic* does not apply where the defendant complains of merely shoddy or poor performance by his trial counsel; for a defendant to be entitled to such a presumption, his attorney's failure must be complete. *See Bell v. Cone*, 535 U.S. at 697, 122 S. Ct. at 1851 (holding the presumption applicable only when counsel entirely failed to subject the prosecution's case to meaningful adversar-

ial testing); *Riddle v. Cockrell*, 288 F.3d 713, 718 (5th Cir. 2002) (holding “constructive denial of counsel” sufficient to support a presumption of prejudice arises only when counsel was absent from the courtroom, there was an actual conflict of interest, or there was official interference with the defense), *cert. denied*, 537 U.S. 953 (2002); *Gochicoa v. Johnson*, 238 F.3d 278, 284 (5th Cir. 2000) (“A constructive denial of counsel occurs in only a very narrow spectrum of cases where the circumstances leading to counsel’s ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all.’ We have found constructive denial in cases involving the absence of counsel from the courtroom, conflicts of interest between defense counsel and the defendant, and official interference with the defense; and have stated that constructive denial will be found when counsel fails to subject the prosecution’s case to any meaningful adversarial testing.” (*citations and footnote omitted*)).

At all times throughout voir dire and trial, petitioner was represented by both his trial counsel, attorneys Mario Trevino and Gus Wilcox. Petitioner has alleged no [489] facts showing he was ever completely devoid of legal representation during jury selection or trial; the first *Cronic* exception to *Strickland* has no application to petitioner’s trial.

Petitioner’s allegations that his trial counsel inadequately questioned the jury venire during voir dire (about their views on DNA evidence), failed to make a timely request for the assistance of a DNA expert, failed to timely move for a mistrial and continuance, and failed to adequately cross-examine the prosecution’s DNA expert do not fall within the narrow scope of the presumed prejudice rule announced in *Cronic*. *Bell v. Cone*, 535 U.S. at 697, 122 S. Ct. at 1851 (holding

the presumption applicable only when counsel entirely failed to subject the prosecution's case to meaningful adversarial testing). The second *Cronic* exception to *Strickland* does not apply to petitioner's voir dire or trial.

Finally, petitioner presented the state habeas court with no evidence showing his trial counsel were ever involved in a relationship with any party, person, or other being (including another client or former client) which had any deleterious effects on said counsel's performance during voir dire or trial analogous to the extreme situations in which the Supreme Court has held the third *Cronic* exception to *Strickland* applicable. On the contrary, the record before the state habeas court appears to suggest the petitioner's trial counsel's only mistake in judgment was to rely on petitioner's ultimately erroneous assurances that his DNA would not be found on Salinas' clothing. Petitioner failed to present the state habeas court with any evidence showing his trial counsels' relationship with any person, place, or thing (other than their reliance on petitioner's own assurances) had any deleterious impact on the outcome of petitioner's trial.

c. *No Constitutional Right to an Evidentiary Hearing*

Third, there is no constitutional right to an evidentiary hearing in connection with a motion for new trial when that motion, like the one filed by petitioner, raises purely legal arguments that do not require evidentiary development. See *United States v. Runyan*, 290 F.3d 223, 248 (5th Cir.) (holding a motion for new trial may be ruled on without an evidentiary hearing and the decision to hold a hearing rests within the sound discretion of the trial court), *cert. denied* 537 U.S. 888 (2002);

*United States v. Blackburn*, 9 F.3d 353, 358 (5th Cir. 1993) (same), *cert. denied*, 513 U.S. 830 (1994).

Petitioner's motion for new trial, although partially cast in the verbiage of ineffective assistance, was, in fact, little more than an effort to re-litigate petitioner's previously unsuccessful motions for mistrial and continuance. Petitioner alleged no specific facts in support of his constructive ineffective assistance claim that identified any specific deficiencies in his trial counsel's performance or showed how those acts or omissions would have affected the outcome of petitioner's trial. As petitioner's trial counsel candidly admitted during his testimony at petitioner's state habeas corpus hearing, the trial court was fully aware of the reasons why petitioner believed he was entitled to a mistrial, as well as the reasons why petitioner felt he had been entitled to a continuance.<sup>91</sup> Petitioner alleged no facts, and presented no evidence to the state habeas court, suggesting what evidence could have been presented during an evidentiary hearing to support petitioner's motion for new trial.

As was explained at length above, petitioner did not allege any facts suggesting [490] his trial counsel actually rendered ineffective assistance under the *Strickland* test in connection with petitioner's voir dire. Rather, petitioner's first ground in his motion for new trial argued the trial court had effectively deprived petitioner of the opportunity to voir dire the jury venire regarding their views on DNA evidence by refusing to grant petitioner's motion for mistrial. Petitioner's sec-

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<sup>91</sup> S.F. State Habeas Hearing, testimony of Mario Trevino, at pp. 48-49.

ond ground in his motion for new trial argued the state trial court had erred in denying petitioner's motion for continuance. Petitioner does not identify any specific facts or evidence that he claims could or should have been developed by a substitute counsel, or anyone else, in support of either of these two grounds for relief. Under such circumstances, there was no duty imposed on the state trial court to hold an evidentiary hearing to resolve petitioner's conclusory motion for new trial. *See United States v. Demik*, 489 F.3d 644, 646-47 & n.3 (5th Cir.) (holding a defendant's conclusionary allegations of ineffective assistance of counsel were insufficient to require an evidentiary hearing on a motion for new trial where the defendant did not allege any specific facts showing precisely what actions his attorney should have taken or exactly how those actions would have affected the outcome of his trial), *cert. denied*, 552 U.S. 982 (2007).

Moreover, any error committed by the state trial court in failing to grant petitioner an evidentiary hearing on petitioner's motion for new trial was ameliorated, if not rendered harmless, by virtue of the fact the petitioner was afforded a full and fair opportunity to litigate, with an evidentiary hearing, the propriety of the trial court's denial of his motion for new trial and failure to grant petitioner an evidentiary hearing on same (in connection with petitioner's thirty-second ground for relief) in the course of petitioner's first state habeas corpus proceeding. During his first state habeas corpus proceeding, petitioner presented the state courts with no evidence supporting either of his grounds for new trial or establishing that any such evidence has ever existed. Any error in the failure of the state trial court to hold an evidentiary hearing in connection with petitioner's motion for new trial was



harmless. See *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722, 123 L. Ed. 2d 353 (1993) (holding the test for harmless error in a federal habeas corpus action brought by a state prisoner is "whether the error had substantial and injurious effect or influence in determining the jury's verdict").

#### D. Conclusion

Petitioner failed to present the state habeas court with any evidence showing either (1) his trial counsel suffered from "an actual conflict of interest" which had an "adverse effect," within the meaning of *Cuyler*, on petitioner's capital murder trial, or (2) petitioner was constructively denied legal representation at any point during voir dire or trial within the meaning of *Cronic*. Any error by the state trial court in denying petitioner's motion for new trial without holding an evidentiary hearing was harmless. Accordingly, the Texas Court of Criminal Appeals' rejection on the merits of petitioner's fifth claim herein, when presented in the form of petitioner's thirty-second claim for state habeas relief in petitioner's original state habeas corpus proceeding, was the product of a reasonable application of the clearly established standard announced in *Strickland* and was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the petition- [491] er's state habeas corpus proceeding. Petitioner's fifth claim herein does not warrant federal habeas relief.



## VII. *Unconstitutionally Vague "Aggravating" Factors*

### A. *The Claim*

In his seventh claim herein, petitioner argues the lack of statutory definitions or definitions in his punishment phase jury instructions of various key terms employed in the Texas capital sentencing special issues rendered those special issues unconstitutionally vague.<sup>92</sup>

### B. *State Court Disposition*

Petitioner raised this same challenge to the Texas capital sentencing special issues as his ninth point of error on direct appeal.<sup>93</sup> The Texas Court of Criminal Appeals summarily rejected this argument, along with several other facial challenges to the constitutionality of the Texas capital sentencing scheme, based on long-standing but un-cited precedent. *Trevino v. State*, 991 S.W.2d at 855.

Petitioner raised this same complaint again as his twenty-first ground for relief in his original state habeas corpus application.<sup>94</sup> The state habeas court concluded this argument was foreclosed by virtue of the fact (1) petitioner had procedurally defaulted on this claim by failing to request the state trial court include definitions of any of the terms petitioner now claimed to be "vague" in petitioner's punishment phase jury instructions, (2) the Texas Court of Criminal Appeals had

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<sup>92</sup> Petitioner's Amended Petition, at pp. 52-53.

<sup>93</sup> Appellant's Brief, at pp. 60-61.

<sup>94</sup> State Habeas Transcript, Volume I, at pp. 45-49.

already rejected this argument on the merits in the course of petitioner's direct appeal, and (3) the Texas Court of Criminal Appeals had repeatedly rejected this same argument.<sup>95</sup> The Texas Court of Criminal Appeals adopted the habeas trial court's conclusions when it denied petitioner's first state habeas corpus application. *Ex parte Carlos Trevino*, WR-48,153-01 (Tex. Crim. App. April 4, 2001).

C. *Synthesis—No Merit*

This Court has repeatedly rejected challenges to the allegedly vague "aggravating" factors employed in the Texas capital sentencing special issues, primarily because this argument misconstrues the nature of the Texas capital sentencing scheme. Unlike most of the cases relied upon by petitioner, Texas is not a "weighing jurisdiction" where capital sentencing jurors must balance "aggravating" versus "mitigating" factors before rendering a verdict at the punishment phase of a capital trial. *See Hughes v. Johnson*, 191 F.3d 607, 621-23 (5th Cir. 1999) (holding no Eighth Amendment violation resulted from Texas Court of Criminal Appeals' refusal to engage in proportionality review of capital sentencing jury's answer to mitigation special issue because Texas is a non-weighing jurisdiction), *cert. denied*, 528 U.S. 1145 (2000).

Petitioner's challenges to the allegedly vague terms employed in the Texas capital sentencing scheme's future dangerousness and "mitigation" or *Penry* special issues have repeatedly been rejected by both this Court and the Fifth Circuit because (1) each of the key terms included in these special issues is fully capable of

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<sup>95</sup> State Habeas Transcript, Volume II, at pp. 78-79.

a commonsense, practical meaning that eliminates the need for lengthy, legalistic, definitions [492] and (2) applicable Supreme Court precedent permits a capital sentencing jury to exercise broad discretion to *withhold* a death sentence from a defendant who is otherwise eligible to receive same so long as the jury is permitted to consider all mitigating evidence presented during trial. See *Leal v. Dretke*, 428 F.3d 543, 553 (5th Cir. 2005) (listing the many Fifth Circuit opinions rejecting complaints about the failure of Texas courts to define the terms “probability,” “criminal acts of violence,” and “continuing threat to society” in the first Texas capital sentencing special issue), *cert. denied*, 547 U.S. 1073 (2006); *Moore v. Quarterman*, 526 F. Supp. 2d 654, 721-24 (W.D. Tex. 2007) (listing the many opinions of this Court and the Fifth Circuit rejecting challenges premised on the alleged vagueness of the future dangerousness capital sentencing special issue and holding the allegedly vague terms in the mitigation or *Penry* special issue are constitutionally sufficient because (1) Texas is not a weighing jurisdiction, (2) the Eighth Amendment permits granting a capital sentencing jury unfettered discretion to *withhold* a death sentence once it has determined a defendant is eligible to receive same, and (3) the *Penry* special issue does not preclude the capital sentencing jury’s consideration of any relevant mitigating evidence), *CoA denied*, 534 F.3d 454 (5th Cir. 2008); *Martinez v. Dretke*, 426 F. Supp. 2d 403, 530 (W.D. Tex. 2006) (holding the Texas capital sentencing special issues need not be accompanied by definitions because the key terms therein are susceptible of a logical, commonsense, interpretation by rational jurors and the Eighth Amendment does not preclude granting a Texas jury unfettered discretion (in the mitigation special issue) to *withhold* the death penalty

so long as the jury is permitted to consider all mitigating evidence before it in so doing), *CoA denied*, 270 Fed. Appx. 277 (5th Cir. 2008); *Salazar v. Dretke*, 393 F. Supp. 2d 451, 488-91 (W.D. Tex. 2005) (same), *affirmed*, 260 Fed. Appx. 643 (5th Cir. 2007), *cert. denied*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2963, 171 L. Ed. 2d 893 (2008). Petitioner's complaints about the alleged "vague" terms employed in the Texas capital sentencing special issues do not possess any arguable merit.

#### D. *Conclusion*

The Texas Court of Criminal Appeals' rejections on the merits, in the course of both petitioner's direct appeal and original state habeas corpus proceeding, of petitioner's complaints about allegedly vague "aggravating" factors in the Texas capital sentencing special issues were neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the petitioner's direct appeal and state habeas corpus proceedings. Petitioner's seventh claim herein does not warrant federal habeas relief.

### VIII. *Failure to Advise Jury re Effect of a Hung Jury*

#### A. *The Claim*

In his eighth and final substantive claim herein, petitioner argues the Texas capital sentencing scheme prevents the trial court from advising a capital sentenc-

ing jury of the effect of a single holdout juror, i.e., of a hung jury.<sup>96</sup>

### B. *State Court Disposition*

Petitioner presented this same argument as his fourteenth point of error on [493] direct appeal.<sup>97</sup> The Texas Court of Criminal Appeals summarily rejected this argument, along with several other facial challenges to the constitutionality of the Texas capital sentencing scheme, based on long-standing but un-cited precedent. *Trevino v. State*, 991 S.W.2d at 855.

Petitioner raised this same complaint again as his thirtieth ground for relief in his original state habeas corpus application.<sup>98</sup> The state habeas court concluded this argument was foreclosed by virtue of the fact (1) the Texas Court of Criminal Appeals had already rejected this argument on the merits in the course of petitioner's direct appeal and (2) the Texas Court of Criminal Appeals had repeatedly rejected this same argument.<sup>99</sup> The Texas Court of Criminal Appeals adopted the habeas trial court's conclusions when it denied petitioner's first state habeas corpus application. *Ex parte Carlos Trevino*, WR-48,153-01 (Tex. Crim. App. April 4, 2001).

### C. *Teague Foreclosure*

Respondent correctly argues this claim is foreclosed by the *Teague* non-retroactivity doctrine. *Alex-*

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<sup>96</sup> Petitioner's Amended Petition, at p. 53.

<sup>97</sup> Appellant's Brief, at pp. 71-72.

<sup>98</sup> State Habeas Transcript, Volume I, at pp. 63-64.

<sup>99</sup> State Habeas Transcript, Volume II, at pp. 86-87.



*ander v. Johnson*, 211 F.3d 895, 897-98 (5th Cir. 2000); *Webb v. Collins*, 2 F.3d 93, 95 (5th Cir. 1993).

#### D. *Synthesis—No Merit*

Moreover, this constitutional complaint possesses no arguable merit. The Supreme Court implicitly rejected petitioner's arguments underlying this claim. See *Jones v. United States*, 527 U.S. 373, 382, 119 S. Ct. 2090, 2099, 144 L. Ed. 2d 370 (1999) (holding the Eighth Amendment does not require a capital sentencing jury be instructed as to the effect of a "breakdown in the deliberative process," because (1) the refusal to give such an instruction does not affirmatively mislead the jury regarding the effect of its verdict and (2) such an instruction might well undermine the strong governmental interest in having the jury express the conscience of the community on the ultimate question of life or death).

Furthermore, on numerous occasions, the Fifth Circuit has expressly rejected the legal premise underlying petitioner's eighth claim herein, *i.e.*, the argument a Texas capital murder defendant is constitutionally entitled to have his punishment-phase jury instructed regarding the consequences of a hung jury or a single holdout juror. See, *e.g.*, *Turner v. Quarterman*, 481 F.3d 292, 300 (5th Cir.) (recognizing Fifth Circuit precedent foreclosed arguments the Eighth Amendment and Due Process Clause of the Fourteenth Amendment mandated jury instructions regarding the effect of a capital sentencing jury's failure to reach a unanimous verdict), *cert. denied*, 551 U.S. 1193 (2007); *Hughes v. Dretke*, 412 F.3d 582, 593-94 (5th Cir. 2005) (holding the same arguments underlying petitioner's nineteenth claim herein were so legally insubstantial as to be unworthy of a certificate of appealability), *cert.*



*denied*, 546 U.S. 1177 (2006); *Alexander v. Johnson*, 211 F.3d at 897-98 (holding the *Teague v. Lane* non-retroactivity doctrine precluded applying such a rule in a federal habeas context); *Davis v. Scott*, 51 F.3d 457, 466-67 (5th Cir.) (same), *cert. denied*, 516 U.S. 992 (1995); *Jacobs v. Scott*, 31 F.3d 1319, 1328-29 (5th Cir. 1994) (rejecting application of the Su- [494] preme Court's holding in *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988) to a Texas capital sentencing proceeding), *cert. denied*, 513 U.S. 1067 (1995).

Finally, this Court has repeatedly rejected this same claim. See, e.g., *Bartee v. Quarterman*, 574 F. Supp. 2d at 702-03 (rejecting arguments that the Constitution requires an instruction informing a capital sentencing jury of the results of its failure to reach unanimous verdict); *Moore v. Quarterman*, 526 F. Supp. 2d at 729 (listing the Fifth Circuit opinions and opinions of this Court rejecting this same argument); *Blanton v. Quarterman*, 489 F. Supp. 2d 621, 644-45 (W.D. Tex. 2007) (rejecting complaint that a Texas capital sentencing jury must be instructed on the effect of a single hold-out juror), *affirmed*, 543 F.3d 230 (5th Cir. 2008), *cert. denied*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2383, 173 L. Ed. 2d 1301 (2009); *Martinez v. Dretke*, 426 F. Supp. 2d at 534-36 (relying on the Supreme Court's holding in *Jones v. United States* to reject the same arguments raised by petitioner herein premised on the Supreme Court's holdings in *Mills v. Maryland* and *Caldwell v. Mississippi*).

No federal court has ever held a Texas capital defendant has a constitutional right to a punishment-phase jury instruction advising his capital sentencing jury of the effect of hung jury or a single hold-out juror.

### E. Conclusion

Petitioner's proposed new rule is barred by the holding in *Teague v. Lane*. The state habeas court's rejections on the merits, in the course of both petitioner's direct appeal and first state habeas corpus proceeding, of petitioner's complaint about the failure of his punishment-phase jury charge to inform the jury regarding the effect of a single hold-out juror were neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor based on an unreasonable determination of the facts in light of the evidence presented in petitioner's trial and first state habeas corpus proceeding.

### IX. Certificate of Appealability

The AEDPA converted the "certificate of probable cause" previously required as a prerequisite to an appeal from the denial of a petition for federal habeas corpus relief into a "Certificate of Appealability" ("CoA"). See *Hill v. Johnson*, 114 F.3d 78, 80 (5th Cir. 1997) (recognizing the "substantial showing" requirement for a CoA under the AEDPA is merely a change in nomenclature from the CPC standard); *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997) (holding the standard for obtaining a CoA is the same as for a CPC). The CoA requirement supersedes the previous requirement for a certificate of probable cause to appeal for federal habeas corpus petitions filed after the effective date of the AEDPA. *Robison v. Johnson*, 151 F.3d 256, 259 n.2 (5th Cir. 1998), cert. denied, 526 U.S. 1100 (1999); *Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir. 1997), cert. denied sub nom. *Monroe v. Johnson*, 523 U.S. 1041 (1998).

Under the AEDPA, before a petitioner may appeal the denial of a habeas corpus petition filed under Section 2254, the petitioner must obtain a CoA. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36, 123 S. Ct. 1029, 1039, 154 L. Ed. 2d 931 (2003); 28 U.S.C. § 2253(c)(2). Likewise, under the AEDPA, appellate review of a habeas petition is limited to the issues on which a CoA is granted. See *Crutcher v. Cockrell*, 301 F.3d 656, 658 n.10 (5th Cir. 2002) [495] (holding a CoA is granted on an issue-by-issue basis, thereby limiting appellate review to those issues); *Jones v. Cain*, 227 F.3d 228, 230 n.2 (5th Cir. 2000) (holding the same); *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997) (holding the scope of appellate review of denial of a habeas petition limited to the issues on which CoA has been granted). In other words, a CoA is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which CoA is granted alone. *Crutcher v. Cockrell*, 301 F.3d at 658 n.10; *Lackey v. Johnson*, 116 F.3d at 151; *Hill v. Johnson*, 114 F.3d at 80; *Muniz v. Johnson*, 114 F.3d at 45; *Murphy v. Johnson*, 110 F.3d 10, 11 n.1 (5th Cir. 1997); 28 U.S.C. § 2253(c)(3).

A CoA will not be granted unless the petitioner makes a substantial showing of the denial of a constitutional right. *Tennard v. Dretke*, 542 U.S. 274, 282, 124 S. Ct. 2562, 2569, 159 L. Ed. 2d 384 (2004); *Miller-El v. Cockrell*, 537 U.S. at 336, 123 S. Ct. at 1039; *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 1603, 146 L. Ed. 2d 542 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 3394, 77 L. Ed. 2d 1090 (1983).

To make such a showing, the petitioner need *not* show he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented are ade-

quate to deserve encouragement to proceed further. *Tennard v. Dretke*, 542 U.S. at 282, 124 S.Ct. at 2569; *Miller-El v. Cockrell*, 537 U.S. at 336, 123 S. Ct. at 1039; *Slack v. McDaniel*, 529 U.S. at 484, 120 S. Ct. at 1604; *Barefoot v. Estelle*, 463 U.S. at 893 n.4, 103 S. Ct. at 3394 n.4. This Court is authorized to address the propriety of granting a CoA *sua sponte*. *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000).

The showing necessary to obtain a CoA on a particular claim is dependent upon the manner in which the District Court has disposed of a claim. If this Court rejects a prisoner's constitutional claim on the merits, the petitioner must demonstrate reasonable jurists could find the court's assessment of the constitutional claim to be debatable or wrong. "[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. at 338, 123 S. Ct. at 1040 (quoting *Slack v. McDaniel*, 529 U.S. at 484, 120 S. Ct. at 1604). Accord *Tennard v. Dretke*, 542 U.S. at 282, 124 S.Ct. at 2569. In a case in which the petitioner wishes to challenge on appeal this Court's dismissal of a claim for a reason not of constitutional dimension, such as procedural default, limitations, or lack of exhaustion, the petitioner must show jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* whether this Court was correct in its procedural ruling. See *Slack v. McDaniel*, 529 U.S. at 484, 120 S. Ct. at 1604 (holding when a district court denies a habeas claim on procedural grounds, without reaching the underlying constitutional claim, a CoA may issue only when the peti-

tioner shows that reasonable jurists would find it debatable whether (1) the claim is a valid assertion of the denial of a constitutional right and (2) the district court's procedural ruling was correct).

In death penalty cases, any doubt as to whether a CoA should issue must be resolved in the petitioner's favor. *Foster v. Quarterman*, 466 F.3d 359, 364 (5th Cir. 2006); *Dickson v. Quarterman*, 462 F.3d 470, 476 (5th Cir. 2006); *Pippin v. [496] Dretke*, 434 F.3d 782, 787 (5th Cir. 2005); *Bridgers v. Dretke*, 431 F.3d 853, 861 (5th Cir. 2005), *cert. denied*, 548 U.S. 909 (2006).

Nonetheless, a CoA is not automatically granted in every death penalty habeas case. See *Sonnier v. Quarterman*, 476 F.3d 349, 364-69 (5th Cir. 2007) (denying CoA on a wide variety of challenges to the Texas capital sentencing scheme).

Most of petitioner's claims herein fail to satisfy the standard for obtaining a CoA. Both the Fifth Circuit and this Court have repeatedly rejected the legal arguments underlying petitioner's seventh and eighth claims herein. The holding in *Teague v. Lane* forecloses adoption of the new rules advocated by petitioner in his fourth and eighth claims herein. There is no arguable factual or legal basis for petitioner's fifth claim herein. Petitioner's complaint about his trial counsel's failure to raise hearsay objections to the most damaging testimony offered against him at trial (*i.e.*, petitioner's sixth claim herein) is without arguable merit because the relevant state courts determined the testimony in question was admissible under state evidentiary rules. Thus, petitioner is not entitled to a CoA on his fourth through eighth claims herein.



Petitioner's first three claims herein present a more complex series of legal, factual, and procedural issues.

Petitioner's first and second claims herein (i.e., petitioner's *Brady* claim and petitioner's complaint that his trial counsel failed to adequately utilize Rey's statement to impeach and cross-examine prosecution witnesses) do not warrant a CoA with regard to the guilt-innocence phase of petitioner's trial because (1) under applicable Texas law, it did not matter whether Cervantes or petitioner actually delivered the fatal stab wound to Salinas, (2) the jury already had before it considerable evidence, in the form of Gonzales' testimony, showing Cervantes was the person who most likely stabbed Salinas, and (3) Rey's written statement does not refute or impeach any of Gonzales trial testimony. Juan Gonzales repeatedly emphasized during his testimony at both phases of trial that he never saw who stabbed Salinas but he had seen Cervantes with a knife days before the murder and Cervantes told Gonzales days after the murder he had destroyed and disposed of the same knife. Furthermore, Gonzales testified that when he asked Cervantes directly why Cervantes had killed the girl, Cervantes replied brusquely "shut up" and told Gonzales to mind his own business. Moreover, other than the oblique comments made by petitioner during the group's drive back to the party after the murder, there was no evidence suggesting petitioner had done anything with regard to using a knife at the crime scene. In his written statement to police, Rey did not claim to have personal knowledge regarding who actually stabbed Salinas. Instead, Rey merely recited a conversation he had with Cervantes in which Cervantes claimed to have stabbed Salinas. There was no eyewitness testimony at trial regarding exactly who



stabbed Salinas. The medical examiner did testify, however, that her neck showed no indications anyone had attempted to strangle or "snap" her neck. Finally, regardless of whether petitioner personally used the knife to stab Salinas (who could have been stabbed by both Cervantes and the petitioner), Rey's statement recounting Cervantes' hearsay confession would have been of little-to-no value in impeaching Gonzales' trial testimony since neither Rey nor Gonzales claimed to have any personal knowledge of who stabbed Salinas.

The question is far more complicated with regard to these same complaints and the punishment phase of peti- [497] tioner's trial. Reasonable minds could differ regarding whether Rey's statement satisfies the "materiality" prong of *Brady* and the "prejudice" prong of *Strickland*. While Rey's written statement corroborates Gonzales' implicit suggestions that Cervantes was the only person with a knife at the crime scene, neither Rey nor Gonzales claimed to have personal knowledge regarding who actually stabbed Salinas. Moreover, Rey's statement would not have impeached Gonzales' trial testimony regarding the inculpatory conversations between petitioner and Cervantes as the group drove away from Espada Park. There is also the fact that the medical examiner testified that Salinas was stabbed twice. Rey's written statement did not negate the possibility Cervantes and petitioner each stabbed Salinas once. Nonetheless, Gonzales' testimony at trial that Cervantes and Rey both expressed their desire not to leave behind any witnesses was undisputed. Likewise, Gonzales made it clear the petitioner appeared to be ambivalent regarding the fate of Salinas. It is also clear from Gonzales' testimony that Cervantes took the lead in the assault upon Salinas, assaulting her first, striking her, and threatening her to induce her submission to

more assaults by others. Rey's written statement made it clear Cervantes had claimed responsibility for stabbing Salinas and that Rey recalled Cervantes making this statement *before* the conversation between Cervantes and petitioner in the car that Gonzales recounted to the jury. Under such circumstances, reasonable minds could conclude the information contained in Rey's statement may have led the jury to find petitioner less morally culpable for Salinas' death than others present the night of the offense. Therefore, petitioner is entitled to a CoA on his first two claims herein limited to whether this aspect of petitioner's ineffective assistance complaints and petitioner's *Brady* claim satisfy the "materiality" and "prejudice" prongs of the *Brady* and *Strickland* tests, respectively, in connection with the punishment phase of petitioner's trial.

Petitioner's third claim herein, *i.e.*, his complaint of ineffective assistance arising from his trial counsel's failure to adequately investigate petitioner's background and develop and present mitigating evidence during the punishment phase of his trial regarding petitioner's deprived and abusive childhood, was procedurally defaulted. Reasonable minds could not disagree on this point. Nonetheless, reasonable minds could disagree over whether petitioner has satisfied the "fundamental miscarriage of justice" exception to the procedural default doctrine in connection with this claim. Petitioner's federal habeas counsel has presented this Court with evidence suggesting petitioner suffers from the effects of Fetal Alcohol Syndrome, including the inability to express remorse in a recognizable manner. Furthermore, petitioner has presented this Court with evidence showing even the most minimal investigation into petitioner's background (through rudimentary interviews with family members and review of relevant

school and medical records) would have revealed a wealth of additional mitigating evidence far more substantial than the superficial account of petitioner's childhood given by petitioner's lone witness during the punishment phase of trial. Under these circumstances, reasonable minds could disagree over whether petitioner has satisfied the fundamental miscarriage of justice exception to the procedural default doctrine with regard to his *Wiggins* claim, *i.e.*, petitioner's complaint that his trial counsel rendered ineffective assistance at the punishment phase of trial by failing to (1) adequately investigate petitioner's back- [498] ground and (2) discover, develop, and present available mitigating evidence.

For the reasons discussed at length herein, petitioner is not entitled to a Certificate of Appealability in connection with his fourth through eighth claims herein. Nonetheless, petitioner is entitled to a CoA with regard to those portions of his first three claims herein identified in this section.

Accordingly, it is hereby **ORDERED** that:

1. All federal habeas corpus relief requested in petitioner's amended petition herein is **DENIED**.

2. Petitioner is **DENIED** a Certificate of Appealability on his fourth through eighth claims presented in his amended petition herein.

3. Petitioner is **GRANTED** a Certificate of Appealability on the following issues: (1) whether petitioner's *Brady* claim (*i.e.*, petitioner's first claim herein) and petitioner's complaints about his trial counsel's failure to discover and utilize Rey's written statement to cross-examine and impeach prosecution witnesses (*i.e.*, petitioner's second claim herein) satisfy the "mate-

riality” and “prejudice” prongs of the *Brady* and *Strickland* tests, respectively, in connection with the punishment phase of petitioner’s trial; and (2) whether petitioner has satisfied the fundamental miscarriage of justice exception to the procedural default doctrine with regard to his *Wiggins* claim, i.e., petitioner’s complaint that his trial counsel rendered ineffective assistance at the punishment phase of trial by failing to (1) adequately investigate petitioner’s background and (2) discover, develop, and present available mitigating evidence (petitioner’s third claim herein). In all other respects, petitioner is **DENIED** a CoA with regard to his first three claims herein.

4. All other pending motions are **DISMISSED AS MOOT**.

5. The Clerk shall prepare and enter a Judgment in conformity with this Memorandum Opinion and Order.

It is so **ORDERED**.

**SIGNED** this 21st day of December, 2009.

/s/ Xavier Rodriguez  
**XAVIER RODRIGUEZ**  
**UNITED STATES DISTRICT JUDGE**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 10-70004

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CARLOS TREVINO,

*Petitioner*

*v.*

RICK THALER, DIRECTOR, TEXAS DEPARTMENT  
OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS  
DIVISION,

*Respondent*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 5:01-CV-306

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Nov. 14, 2011

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[449 F. App'x 415]

Before DAVIS, SMITH, and DENNIS, Circuit Judges.  
W. EUGENE DAVIS, Circuit Judge.\*

Petitioner Carlos Trevino was convicted of capital murder in Texas state court and sentenced to death. The district court denied each of Trevino's eight claims for habeas relief, but granted a certificate of appealabil-

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\* Pursuant to 5<sup>TH</sup> CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5<sup>TH</sup> CIR. R. 47.5.4.



ity ("COA") pursuant to 28 U.S.C. § 2253(c) on three of these issues. Trevino now petitions this court to issue COAs authorizing appeal from the district court's denial of habeas corpus relief regarding the five issues on which the district court denied COA. Because reasonable jurists would not find it debatable that the district court correctly rejected these five claims, we DENY Trevino's petition for COA regarding these issues. We further address the three issues on which the district court did grant COA. Finding these claims without merit, we AFFIRM the district court's denial of relief on these grounds.

I.

A.

We summarize the key facts and procedural background recited at length by the district court. [417] *Trevino v. Thaler*, 678 F. Supp. 2d 445, 449-55 (W.D. Tex. 2009). The body of 15-year old Linda Salinas was discovered in Espada Park in San Antonio Texas on June 10, 1996. The San Antonio Police Department began an investigation into Salinas's death. Following the investigation, on April 8, 1997, a Bexar County, Texas grand jury indicted Trevino on a charge of capital murder for intentionally and knowingly causing the death of Linda Salinas by cutting and stabbing her with a deadly weapon while in the course of committing and attempting to commit the aggravated sexual assault of Salinas. Trevino rejected the state's subsequent plea offer and chose to go to trial.

Testimony at Trevino's trial established that on the evening of June 9, 1996, he accompanied Santos Cervantes, Bryan Apolinar, Seanido "Sam" Rey, and Juan Gonzales (Trevino's cousin), on a trip in Apolinar's car to a store to buy beer for a party they had been at-



tending. Cervantes enticed 15-year old Linda Salinas to get into Apolinar's car with the assurance Apolinar would take Salinas to a nearby fast-food restaurant.

Instead of driving to the restaurant, Apolinar drove the group to Espada Park, where Cervantes, Apolinar, and Rey sexually assaulted Salinas while she unsuccessfully struggled to escape. Gonzales testified as the prosecution's key witness regarding the following: (1) Gonzales saw Trevino hold Salinas down while Rey raped her; (2) at one point, Trevino urged Gonzales to rape Salinas, but Gonzales refused; (3) Gonzales overheard Apolinar, Cervantes, and Trevino discuss their mutual desire not to leave any witnesses behind; (4) Gonzales heard Rey say "we don't need no witnesses" and heard Cervantes repeat the same comment, then heard Trevino reply "we'll do what we have to do"; (5) at that point, Gonzales returned to the group's vehicle; (5) when the others returned, Gonzales noticed that Cervantes and Trevino had blood on their shirts.

Gonzales further testified that following the incident, during the group's ensuing drive away from the scene, Cervantes made a comment that it was "neat" or "cool" about how Trevino had "snapped" Salinas's neck, and also made a comment about a knife. Trevino responded with the comments "I learned how to kill in prison" and "I learned how to use a knife in prison." Gonzales also testified that, after the incident, Trevino told Gonzales not to say anything to the police. Further, Gonzales testified that when he asked Cervantes why he killed the girl, Cervantes responded "mind your own business." Gonzales additionally testified that while he never saw Trevino or anyone else with a knife at the scene of the murder, Gonzales had seen Cervantes with a knife a few days before Salinas's

murder and, two days after the murder, Cervantes told Gonzales he had broken the knife and thrown it into a river.

Salinas's body was discovered in Espada Park the day after the murder. According to expert testimony at Trevino's trial, an autopsy revealed (1) Salinas suffered two stab wounds to the left side of her neck, one of which was fatal; (2) Salinas sustained soft tissue damage in her vaginal area and at her anal opening; (3) Salinas sustained no internal injuries to her neck other than those caused by the two stab wounds, and there was no physical evidence anyone had attempted to "snap" her neck; and (4) there were scratches on Salinas's legs and fresh bruises on her breasts.

Other evidence during the guilt/innocence phase of Trevino's trial included testimony from forensic and DNA experts establishing (1) the examination of a pair of blue women's shorts and a pair of white [418] women's panties found at the crime scene, both identified by Linda Salinas's mother as belonging to Linda, revealed the presence of polyester and cotton fibers which were consistent with a pair of slacks owned by Trevino; and (2) a blood stain found on Linda Salinas's white panties contained a mixture of the DNA from at least two persons, with DNA testing eliminating as possible sources of the DNA all but Salinas and Trevino from among those identified by Gonzales as present at the scene.<sup>1</sup>

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<sup>1</sup> The state's expert testified that 1 of every 2,684 members of the southwestern United States Hispanic population has the same DNA profile identified on the panties and that the DNA evidence did no more than rule out as possible sources of the blood the other individuals present at the scene except for Trevino and Salinas.

The jury returned a guilty verdict. During the punishment phase of trial, the prosecution presented evidence regarding Trevino's culpability and future dangerousness, including his former arrests and his admitted membership in a violent street gang. As mitigating evidence, the defense presented Trevino's aunt, who testified generally that she knew Trevino to be a good person and that he had experienced certain difficulties in his life, including the absence of his father and his mother's alcohol problems.

The jury returned its verdict at the punishment phase of trial, finding (1) that Trevino would commit criminal acts of violence in the future which would constitute a continuing threat to society; (2) Trevino actually caused the death of Linda Salinas or, if he did not actually cause her death, he intended to kill her or another, or he anticipated a human life would be taken; and (3) there were insufficient mitigating circumstances to warrant a sentence of life imprisonment. In accordance with the jury's verdict, the state trial court imposed a sentence of death.

Trevino directly appealed his conviction and sentence, asserting 19 claims for relief. The Texas Court of Criminal Appeals affirmed his conviction and sentence. *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999). While his direct appeal was still pending, Trevino filed an application for state habeas corpus relief in which he urged 46 grounds for relief. The state habeas trial court held an evidentiary hearing during which Trevino's former trial counsel testified in part that (1) the defense contacted Gonzales prior to trial and knew what testimony he would give; (2) Trevino never denied participating in the offense and admitted he was present when Salinas was killed; (3) when defense counsel pressed Trevino about the facts of the of-

fense, Trevino responded he was too stoned at the time of the offense to recall details; and (4) Trevino never denied saying "I learned to kill in prison." The state habeas trial court denied the habeas corpus application. The Texas Court of Criminal Appeals adopted the state habeas trial court's findings and conclusions and denied Trevino's state habeas corpus application. *Ex parte Carlos Trevino*, WR-48,153-01 (Tex. Crim. App. April 4, 2001).

On March 14, 2002, Trevino filed his original petition for federal habeas corpus relief in the district court, asserting four claims for relief. He subsequently filed, and the district court granted, an unopposed motion for stay, seeking leave to return to state court and explore a potential mental retardation claim, as well as other unexhausted claims.

Trevino then filed his second state habeas corpus application, asserting new claims that (1) his trial counsel rendered ineffective assistance by failing to adequately investigate, develop, and present available mitigating evidence during the punishment [419] phase of trial; and (2) the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002) precludes his execution because he suffers from fetal alcohol syndrome. The Texas Court of Criminal Appeals dismissed Trevino's second state habeas corpus application pursuant to the Texas writ-abuse statute in an unpublished, per curiam order. *Ex parte Carlos Trevino*, WR-48,153-02, 2005 WL 3119064 (Tex. Crim. App. November 23, 2005).

Thereafter, Trevino filed, and the district court granted, another motion for stay in which Trevino sought to return to state court and exhaust a new claim based on his federal habeas counsel's discovery in the

state's files of a written witness statement dated June 12, 1996 given by Rey indicating that Cervantes, not Trevino, stabbed the victim.

Trevino then filed a motion for appointment of counsel in state court, seeking legal representation in connection with this new claim. However, for over two years the state judicial officers either failed or refused to appoint counsel for Trevino to pursue this claim, despite entreaties from the district court. The district court then lifted the stay and federal proceedings resumed.

B.

On December 8, 2008, Trevino filed his amended petition for federal habeas corpus relief, in which he asserted eight claims for relief. The district court denied relief on all claims, but granted COA on three of these claims. Trevino now appeals the district court's rejection of those three claims. Trevino also seeks COAs to authorize appeal of the claims on which the district court denied COA.

Trevino's primary assertion in the current appeal is that prosecutors failed to disclose Rey's June 12, 1996 written statement which suggested that Santos Cervantes stabbed Salinas and that this nondisclosure violated Trevino's constitutional rights pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

The record evidence indicates that this June 12, 1996 statement was the second of *three* signed, written statements Rey gave to police on June 12 and 13, 1996 during the investigation of Salinas's death. A report created by Detective Charles Gresham summarized all of the witness statements made during the investigation, including Rey's three statements.



In his first statement made on June 12, 1996, Rey essentially denied any involvement in the crime. Gresham's report accurately summarizes this first statement. When Gresham confronted Rey with contradictory testimony from witnesses, Rey made a second statement the same day. In the pertinent part of this second statement, Rey stated that he and his friends drove with the victim from the store to Espada Park where Santos Cervantes took the victim into the woods by himself and then returned alone about 15 minutes later. According to Gresham's summary, when Rey asked Santos Cervantes where the girl was, "Santos told him he killed her." The full written statement is lengthier and includes more detail. This second statement forms the basis for Trevino's *Brady* claim on this petition.

On June 13, 1996, Gresham obtained arrest warrants for Rey and Trevino. After being taken into custody, Rey made a *third* signed, written statement to the police on June 13. This third statement reads in pertinent part as follows:

This is the third statement I have given to the police. Everything I have said in my second statement about how the girl Linda ended up in the car is true.... [420] We got to the park. Santos [Cervantes] and the girl got out of the car and went down the hill. I stayed on the top of the hill where we parked the car. Me, Bryan [Apolinar], Thate [Gonzales], and Carlos [Trevino] stayed with the car for about five minutes. All of use went down to where Santos [Cervantes] was. When I got to where Santos [Cervantes] and Linda were Linda had he[r] pants down to her ankles and her shirt was up. I could see her breasts she did not have her bra



on .... Santos [Cervantes] was having sex with Linda .... After Santos [Cervantes] finished, I think Carlos [Trevino] had sex with her. *Carlos [Trevino] had sex with her about ten seconds.* I had sex with Linda next. I only went about ten seconds. After me Thate [Gonzales] had sex with Linda. He went about ten seconds. Bryan [Apolinar] had sex with Linda next he went about a minute. Santos [Cervantes] had sex with Linda again. Carlos [Trevino] and Bryan [Apolinar] at the same time told me and Thate [Gonzales] to go up and look out. Santos [Cervantes] was still having sex with Linda. Up to this point I did not see anyone hit Linda. No one yelled at her that I know of. Thate [Gonzales] and me went back up the hill to the car. Thate [Gonzales] and me got in the car. We both got in the back. *They were down there about five minutes, Santos [Cervantes], Bryan [Apolinar] and Carlos [Trevino]. Thate [Gonzales] and me were wondering what was taking so long. All three of them came up the hill. I asked what happened Carlos [Trevino] said they killed her that they cut her throat. Santos [Cervantes] said they cut her throat, we killed her[.] I asked how they said we cut her throat. Carlos [Trevino] said don't tell anybody. Carlos [Trevino] started to brush his shoes off with his hand, I saw they had blood on them.*

(underlined emphasis added). Gresham's report included an accurate summary of Rey's third statement. The summary contained the following description of the most relevant part of Rey's third statement:

Seanido [Rey] stated Santos [Cervantes], Bryan [Apolinar], and Carlos [Trevino] then returned to the car and when he asked Carlos [Trevino] what had happened he was told they had cut her throat. He reported he observed Carlos [Trevino] brushing his shoes off with his hand and he could see there was blood on them.<sup>2</sup>

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<sup>2</sup> According to Gresham's report, Rey's third statement was largely consistent with Apolinar and Cervantes' statements. Gresham summarized Apolinar's statement as follows:

Bryan [Apolinar] reported Carlos [Trevino] started jerking on her and he could tell he was trying to break her neck. Bryan [Apolinar] stated at this time he couldn't handle it any more and he walked back to the car. He stated about a minute later they all come back up the slope except Linda [Salinas] and he could see Carlos [Trevino] had blood all over him that he was wiping off with a shirt. Bryan [Apolinar] stated he could also see Carlos [Trevino] had a knife that he was also wiping off and that no one else had blood on them.

Apolinar was convicted of sexually assaulting Salinas. In upholding Apolinar's conviction, the Texas Court of Appeals took note of Apolinar's statement that he witnessed Trevino "stab the victim." *Apolinar v. Texas*, No. 04-99-00644-CR, 2000 WL 1210922, \*1 (Tex. Ct. App. Aug. 16, 2000) (unpublished).

Cervantes pleaded guilty to Salinas's murder. Gresham's summary of Cervantes's statement contains a similar description of the crime:

He reported he then see Carlos [Trevino] grab up Linda and he had her by the neck with both arms and was pushing with them. Santos [Cervantes] stated Carlos [Trevino] put her down and Sam [Rey] put his foot on her neck and told her 'don't move bitch.' Santos [Cervantes] stated he could hear gurgling noises coming from Linda while this was going on. He stated he then

[421] Following the trial of this case, Rey pleaded guilty to murder and is currently serving a 50-year sentence. In connection with his guilty plea, Rey stipulated to the facts contained in Gresham's police report and his witness statements, all three of which were attached to his stipulation. *See State v. Rey*, No. 97-CR-1717C (290th Dist. Ct., Bexar County, Tex. Mar. 25, 1998) (factual stipulations and attached exhibits).<sup>3</sup>

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saw Sam [Rey] move his foot and Carlos [Trevino] grabbed Linda [Salinas] up by the hair and stabs her twice.

<sup>3</sup> This appeal has been complicated by the fact that Trevino's counsel placed Rey's second written statement into the record, but Rey's third written statement inexplicably does not appear in the record on appeal. The district court, therefore, did not have the benefit of reviewing Rey's third written statement. Nevertheless, all three of Rey's signed, written statements appear in the record of Rey's murder case in Bexar County district court. The existence and the content of these statements are beyond dispute and, moreover, our review of Trevino's *Brady* claim is *de novo*. Therefore, we take judicial notice of Rey's third written statement. *See Brown v. Lippard*, 350 F. App'x 879, 883 n.2 (5th Cir. 2009) (taking judicial notice of state courts records outside the record on appeal). This is consistent with our routine practice in *habeas* appeals of taking judicial notice of all related proceedings brought by the appellant, including state proceedings, "even when the prior state case is not made a part of the record on appeal." *See Moore v. Estelle*, 526 F.2d 690, 694 (5th Cir. 1976). If we failed to take judicial notice of Rey's third written statement, the court's understanding of the record evidence would be incomplete. *See id.* ("For a proper understanding of protracted litigation we may draw upon the records of all the preceding cases."). Because Trevino has not had an opportunity to have input into our decision to take judicial notice of documents in the state court proceedings involving Rey, we afford him the right to raise any objection he may have by means of a petition for rehearing, which objection we will consider filed before our opinion issued.

At some point during the instant action, Trevino's federal habeas counsel discovered Rey's *second* June 12, 1996 written statement. The full, signed statement had been kept in one of the state's separate files and, thus, had not been previously turned over to Trevino's lawyers. Nevertheless, the original prosecutors in Trevino's case have provided affidavits in connection with this action asserting that they provided Trevino's trial counsel with a copy of Gresham's entire report before trial, including Gresham's summary of Rey's three statements. Trevino's two trial attorneys, Gus Wilcox and Mario Trevino, have provided counter-affidavits stating that they do not recall ever seeing Gresham's summaries of Rey's statements.

However, the record of Trevino's first state habeas proceeding is inconsistent with the affidavits of Trevino's attorneys. During that proceeding, Wilcox and Mario Trevino both gave testimony strongly suggesting that they had evaluated the witness statements in Gresham's report. Mario Trevino testified that he had been given access to statements of the prosecution's potential witnesses, as well as various police reports, and that he was aware of at least "two guys that gave statements that were pointing the finger to Mr. Trevino." Wilcox went further and testified that because he knew that *all* of the state's potential witnesses would inculcate Trevino, Wilcox had adopted a trial strategy of not calling any witnesses while instead relying on cross-examination in an attempt to create a reasonable doubt. The potential witness list that prosecu-

tors provided to Trevino's attorneys prior to trial included Rey.<sup>4</sup>

[422] On this petition, Trevino relies on Rey's second written statement to argue that if that statement had been disclosed, the defense could have shown that Cervantes, rather than Trevino, killed the victim. Trevino asserts that the alleged nondisclosure of the entire written statement had a prejudicial effect at

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<sup>4</sup> The following exchange with Wilcox took place at the state habeas proceeding:

Q. [W]hat theory of or what defensive posture did you decide to take in front of the jury at guilt/innocence?

A. Well, I think what we were hoping to be able to somehow to do, is somehow show that he was merely present and did nothing to commit the crime.

Q. In order to do it through a witness, you would have had to call one of the State's potential witnesses, right?

A. Well, right. That's part of the problem. So, I mean, I was going to—We would try and develop that through cross-examination at best, really. That's what we were going to have to do.

Q. Because, correct me if I'm wrong, but if you would have called any of those witnesses, they would have put your client at the scene, right?

A. That's right.

Q. And hence corroborated the witnesses called by the State; correct?

A. Well, yeah.

Q. So you made a strategic decision to try to present a case of reasonable doubt through the cross examination of the State's witnesses?

A. That's basically it.



both the guilt and sentencing stages of his trial in violation of his rights under *Brady*.

Trevino has also raised various other claims, including a claim that his trial counsel failed to effectively investigate and present available mitigating information during the sentencing phase of Trevino's trial. As discussed further below on a claim-by-claim basis, the district court rejected each of Trevino's claims for relief.

## II.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), "[b]efore an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA...." *Miller-El v. Cockrell*, 537 U.S. 322, 335, 123 S. Ct. 1029, 1039 (2003); 28 U.S.C. § 2253(c)(1). Trevino is entitled to a COA only if he can make "a substantial showing of the denial of a constitutional right." *Miller-El*, 537 U.S. at 336, 123 S. Ct. at 1039 (citing § 2253(c)(2)). To meet this standard, Trevino must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that issues presented were adequate to deserve encouragement proceed further." *Id.* (internal quotations and citations omitted); accord *Tennard v. Dretke*, 542 U.S. 274, 288, 124 S. Ct. 2562, 2572 (2004).

In making a COA inquiry, we must consider that AEDPA required the district court to defer to the state court's resolution of Trevino's claims, except in limited circumstances. *Foster v. Quarterman*, 466 F.3d 359, 365 (5th Cir. 2006). Under AEDPA, federal courts may not grant habeas relief with respect to a claim adjudicated on the merits in state court unless that adjudication (1) resulted in a decision that was contrary to, or



involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1)-(2); *see also* *Penry v. Johnson*, 532 U.S. 782, 792, 121 S. Ct. 1910, 1918 (2001). We “must presume that the state court’s factual findings are correct unless [Trevino] meets his burden of rebutting that presumption by clear and convincing evidence.” *Reed v. Quarterman*, 555 F.3d 364, 368 (5th Cir. 2009) (citing 28 U.S.C. § 2254(e)(1)).

[423] “[A]bsent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief.” *Orman v. Cain*, 228 F.3d 616, 619-20 (5th Cir. 2000); 28 U.S.C. § 2254(b)(1). Special circumstances permitting federal courts to review a claim before it has been exhausted in state court include (1) when there is an absence of available state corrective process; or (2) when circumstances exist that render such process ineffective to protect the federal habeas petitioner’s rights. 28 U.S.C. § 2254(b)(1)(B)(i)-(ii).

In reviewing an issue on which the district court granted COA, “we review the district court’s findings of fact for clear error and its conclusions of law *de novo*, applying the same standards to the state court’s decision as did the district court.” *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004).

### III.

We first address the five issues on which the district court denied COA.

## A.

Trevino first argues that the state violated his constitutional rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) by failing to disclose Rey's second written statement dated June 12, 1996. He contends that had the state properly disclosed this statement, he likely could have established reasonable doubt regarding his guilt.

Because the state courts never effectively addressed the merits of this issue or dismissed it as procedurally defaulted, the district court reviewed this claim *de novo* pursuant to 28 U.S.C. § 2254(b)(1).<sup>5</sup> The district court determined that unresolved questions of fact exist as to whether the government suppressed or properly disclosed Rey's statement, but concluded that the statement did not meet *Brady's* materiality requirement with regard to the guilt/innocence phase of the trial. On our own *de novo* review, we agree with the district court regarding the statement's lack of materiality.

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<sup>5</sup> The district court explained that when Trevino's federal habeas counsel discovered Rey's statements, the district court stayed its proceedings to allow Trevino to pursue the *Brady* claim in state court. The state authorities, however, failed or refused to appoint counsel for Trevino, despite explicit entreaties from the district court. The district court held that the state's failure or refusal to appoint counsel rendered the state process "ineffective" to protect Trevino's constitutional rights, pursuant to 28 U.S.C. § 2254(b)(1), thus permitting the district court to review the claim without it having first been adjudicated in state court. See *Trevino*, 678 F. Supp. 2d at 458. We agree that, under the circumstances, the district court was authorized under 28 U.S.C. § 2254(b)(1) to review the claim *de novo*.

There are three basic elements to a *Brady* claim: (1) the evidence must be favorable to the accused, either because it is exculpatory or because it may be used as impeachment evidence; (2) the evidence must have been suppressed by the state; and (3) the evidence must be "material." *Banks v. Dretke*, 540 U.S. 668, 691, 124 S. Ct. 1256, 1272 (2004). Evidence is "material," i.e., prejudicial, when there exists a "reasonable probability" that had the evidence been disclosed the result at trial would have been different. *Banks*, 540 U.S. at 698-99, 124 S. Ct. at 1276; see also *Miller v. Dretke*, 404 F.3d 908, 913-16 (5th Cir. 2005).

1.

As an initial matter, although the district court did not resolve the factual issues [424] surrounding whether the state suppressed Rey's second written statement, the record evidence strongly indicates that the prosecution did not suppress the statement.<sup>6</sup> Given the evidence discussed above indicating that the prosecution disclosed Gresham's accurate summary of Rey's three statements to Trevino's attorneys prior to trial, this should have put defense counsel on notice that Rey had made one statement to police suggesting that Cervantes stabbed the victim. The onus was then on Trevino's lawyers to request a copy of the full statement. See generally *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997) (failure to discover material evidence must not be the result of the lack of due dili-

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<sup>6</sup> The state argued that Rey's written statement was available to the defense under the state's "open-file" policy. The district court held that it need not resolve the factual issues regarding whether the state had suppressed the statement given the district court's conclusion that the statement was not material.

gence). Regardless, even assuming that the state failed to properly disclose Rey's second written statement, this statement does not meet the requisite standard of materiality for the following reasons.

2.

In light of Rey's third written statement to the police inculcating Trevino in Salinas's murder, it is indisputable that Rey's second written statement was immaterial to Trevino's case. If Trevino's lawyers had been successful in introducing Rey's second statement<sup>7</sup> to suggest that Cervantes was solely responsible for Salinas's murder, the prosecution undoubtedly would have introduced Rey's third statement.<sup>8</sup> Introduction of Rey's third statement would have destroyed any benefit Trevino would have otherwise gained from the second statement. Not only does Rey's third statement expressly retract his second statement's assertion that Cervantes took Salinas to the woods by himself, Rey's third statement plainly describes Trevino's active participation in Salinas's rape and murder. Rey's third statement contains the following testimony: (1)

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<sup>7</sup> Rey's second written statement would likely have been inadmissible hearsay. See FED. R. EVID. 801(c); TEX. R. EVID. 801(d). In this circuit, inadmissible evidence may be material under *Brady* if it somehow leads to other exculpatory evidence; the key is still "whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different." *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999).

<sup>8</sup> See, e.g., FED. R. EVID. 806 ("When a hearsay statement ... has been admitted in evidence," the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness....); accord TEX. R. EVID. 806

Trevino raped Salinas; (2) Trevino, Cervantes, and Apolinar were present when Salinas was killed; (3) when Trevino, Cervantes, and Apolinar returned to the car without Salinas, Rey "asked what happened [and] Carlos [Trevino] said they killed her that they cut her throat"; (4) Trevino had blood on his shoes; and (5) Trevino said "don't tell anybody."

In the extremely unlikely event that Rey had attempted to testify at Trevino's trial to the facts contained in his second statement, the prosecution would have undoubtedly impeached Rey with his third statement to the police. Accordingly, it is very clear that even if Trevino's counsel had been permitted to use Rey's second written statement at trial, this would have failed to benefit Trevino. To the contrary, admission of Rey's written statements would have been extremely damaging to Trevino's interests.

[425] Under these circumstances, Rey's second written statement cannot be considered material because there is not a "reasonable probability" that the outcome of Trevino's trial would have been different if the full statement had been disclosed. In fact, quite the opposite is true—it is almost certain that the outcome would have been the same.

### 3.

Additionally, we note our agreement with the district court that the evidence presented at Trevino's trial supports the jury's verdict of conviction under Texas's law of the parties.<sup>9</sup> As explained, Rey's written

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<sup>9</sup> Such law, according to the instruction given to the jury, provides, *inter alia*, the following:



statements cast no doubt on the substantial, uncontroverted evidence presented during the guilt/innocence phase of the trial supporting the conclusion that Trevino acted with intent to commit the offense and aided or attempted to aid other members of the group in commission of Salinas's murder. Rey's third written statement is consistent with the trial evidence. There is no reasonable probability that but for the alleged failure of the prosecution to disclose Rey's second written statement, the jury would have found Trevino not guilty of capital murder under Texas's law of the parties.

Jurists of reason cannot find the district court's denial of Trevino's *Brady* claim on these grounds debatable. See *Miller*, 404 F.3d at 916 (denying COA in capital murder case regarding suppression of evidence that defendant had not shot the victim because "uncontroverted, overwhelming evidence" showed that defendant participated in the crime and was, thus, guilty under Texas's law of the parties). We, therefore, affirm the district court's denial of a COA on this issue.

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[A] person is criminally responsible as a party to an offense if the offense is committed by his own conduct, or by the conduct of another for which he is criminally responsible, or both. Each party to an offense may be charged with commission of the offense... A person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense.

See *Trevino*, 678 F. Supp. 2d 445 (quoting and explaining the instructions given to the jury regarding Texas's law of parties); see also TEX. PENAL CODE § 7.02 (2011).



## B.

We next turn to Trevino's request for COA regarding the district court's denial of his claim for ineffective assistance of counsel during the guilt/innocence phase of trial based on his counsel's failure to discover Rey's second written statement. It is clear that this argument fails for the same reasons described above.

To prove ineffective assistance of counsel, Trevino must generally show (1) that his counsel's performance was deficient; and (2) that this deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2059 (1984). Trevino cannot show prejudice based on his counsel's failure to uncover Rey's second written statement for the same reasons that he cannot show that the statement was material under *Brady*. The record evidence suggests, moreover, that because Trevino's attorneys had access to Gresham's accurate summaries of all three of Rey's witness statements, they appreciated the import of Rey's third statement. The record demonstrates that Trevino's attorneys reasonably believed all of the state's potential witnesses—including Rey—would inculpate Trevino if called to testify. This is why [426] Trevino's attorneys did not attempt to call Rey or any other witnesses. Nothing in the record remotely suggests that disclosure of the full text of Rey's second written statement would have changed this strategic calculation made by Trevino's attorneys, particularly in light of Rey's third statement. Jurists of reason cannot debate the district court's conclusion on this issue. Therefore, we affirm the district court's denial of a COA regarding this issue.

## C.

We next consider Trevino's argument that a COA should issue regarding the district court's rejection of Trevino's claim that his trial counsel failed to investigate and develop mitigating evidence during the sentencing phase of trial. The district court held that this claim was procedurally defaulted because Trevino failed to raise it during his first state habeas proceeding, which resulted in dismissal by the Texas Court of Criminal Appeals on the basis of Texas's "abuse of the writ" doctrine when Trevino presented the issue in his second state habeas suit. *See* TEXAS CODE OF CRIM. P. ANN. ART. 11.071 § 5(c) (2011).

A claim is procedurally defaulted when a state court clearly and expressly bases its dismissal of a claim on a state procedural rule and that rule provides an independent and adequate ground for dismissal. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54 (1991). When such a dismissal based on independent and adequate state law grounds has occurred, we do not reach the merits of the federal habeas claim. *Id.*

The district court rightly observed that we have expressly held "Texas's abuse of the writ doctrine is a valid state procedural bar foreclosing federal habeas review." *Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006); accord *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008). Moreover, we recently addressed a "perfunctory" dismissal order by the Texas Court of Criminal Appeals—similar to the order dismissing Trevino's second state habeas petition—that cited Article 11.071, Section 5 of the Texas Code of Criminal Procedure in dismissing a claim for ineffective assistance of counsel, without further explanation.

*Balentine v. Thaler*, 626 F.3d 842, 849-57 (5th Cir. 2010) (panel rehearing). We held that this dismissal order could not be read as having reached the merits of the federal claim, but rather must be viewed as resting on independent and adequate state law grounds for purposes of procedural default. *Id.* Accordingly, we agree with the district court that Trevino's claim for ineffective assistance of counsel, which the Texas Court of Criminal Appeals dismissed on abuse-of-writ grounds under Section 5 of Article 11.071 of the Texas Code of Criminal Procedure, was dismissed on independent and adequate state grounds and is, thus, procedurally defaulted. Reasonable jurists cannot disagree with the district court's procedural ruling in this regard. We, therefore, affirm the district court's denial of COA for this claim.<sup>10</sup>

D.

We also affirm the district court's denial of COA regarding Trevino's claim that the factors in Texas's capital sentencing scheme—such as “future dangerousness”—are vaguely defined and fail to properly channel the jury's discretion. As [427] the district court correctly held, we have repeatedly rejected similar arguments. *See, e.g., Leal v. Dretke*, 428 F.3d 543, 553 (5th Cir. 2005) (citing numerous cases rejecting vagueness challenges to the terms of Texas's capital sentencing scheme). Because jurists of reason cannot debate that the district court correctly held that this claim has no

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<sup>10</sup> The district court granted COA on the issue of whether Trevino could meet the “fundamental miscarriage of justice” exception to the procedural default of his ineffective-assistance claim, and we will address that issue separately below.

merit under binding precedent, we affirm the district court's denial of a COA.

E.

Finally, we affirm the district court's denial of a COA regarding Trevino's argument that Texas procedure unconstitutionally prevented the trial court from informing the jury of the effect of a hung jury during Trevino's sentencing. The district court noted first that Trevino raised this same claim during his direct appeal in state court and during his first state habeas proceeding; the Texas courts rejected the claim. The district court also correctly explained that the Supreme Court and this court have rejected similar claims numerous times. *See Jones v. United States*, 527 U.S. 373, 382, 119 S. Ct. 2090, 2098 (1999) (holding that the Eighth Amendment does not require a capital sentencing jury to be instructed regarding the effect of a "breakdown in the deliberative process").<sup>11</sup> Reasonable jurists cannot debate the district court's disposition of this issue. Thus, we affirm the district court's denial of a COA on this ground.

IV.

We next consider the three claims on which the district court granted COA.

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<sup>11</sup> *See also Turner v. Quarterman*, 481 F.3d 292, 300 (5th Cir. 2007) (recognizing that precedent precludes any argument that the Eighth Amendment or the Due Process clause of the Fourteenth Amendment requires a Texas capital sentencing jury to be informed of the effect of failure to reach a unanimous verdict).

## A.

The district court granted COA on Trevino's *Brady* claim regarding the prosecution's alleged suppression of Rey's second written statement during the punishment phase of his trial. Trevino argues that had the prosecution disclosed Rey's second written statement, it is reasonably probable that the jury would not have sentenced him to death. For substantially the same reasons that we reject this claim with regard to the guilt/innocence phase of trial, we hold that the government's alleged suppression of Rey's second written statement was not material to the punishment phase of Rey's trial under *Brady*.

Admission of Rey's written statements at the sentencing phase of trial would not have tended to prove that Trevino lacked culpability in the stabbing death of Salinas. As explained, Rey contradicted all of the salient facts of his second written statement in the third written statement he made to the police after his arrest. Subsequently, Rey pleaded guilty to Salinas's murder, stipulating to the truth of his third statement. Whatever probative value the second written statement may have had, therefore, was negated by Rey's third statement and, later, by his guilty plea. As such, a reasonable jury could not have given Rey's second statement any credence during sentencing.

Accordingly, Rey's second written statement was not material to Trevino's sentence because there is no "reasonable probability" that the prosecution's disclosure of the statement would have changed the outcome of the sentencing phase of Trevino's trial.



[428]

## B.

The district court granted COA regarding Trevino's claim that he received ineffective assistance of counsel based on his trial attorneys' failure to discover and present Rey's second written statement during the sentencing phase of trial. Trevino argues that such failure meets the standard for prejudice established by the Supreme Court. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. This claim has no merit for the reasons stated above. The record evidence clearly shows that Rey's second statement had no materiality and that, accordingly, Trevino's attorneys' alleged failure to seek out the full statement and attempt to present it to the jury did not prejudice Trevino's interests during sentencing under the meaning of *Strickland*.

## C.

Finally, the district court granted COA regarding Trevino's claim that it would be a "fundamental miscarriage of justice" if Trevino were not permitted to pursue his claim that his trial counsel failed to investigate and present compelling mitigating evidence at the sentencing phase of trial. As explained above, we agree with the district court that Trevino's ineffective-assistance claim regarding his counsel's alleged failure to discover and use "new," potentially mitigating evidence is procedurally barred under Texas's abuse-of-writ doctrine. Thus, the only issue on which the district court granted COA is whether Trevino's claim qualifies for the narrow exception to the prohibition on habeas review of procedurally barred claims when there exists a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 749-50, 111 S. Ct. 2546, 2564-65 (1991).



To satisfy the “miscarriage of justice” test, a petitioner must supplement his constitutional claim with a colorable showing of “actual innocence.” *Sawyer v. Whitley*, 505 U.S. 333, 335-36, 112 S. Ct. 2514, 2519 (1992). In the context of the sentencing phase of a capital murder trial, the Supreme Court has held that a showing of actual innocence is made when a petitioner shows by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found petitioner *eligible* for the death penalty under applicable law. *Id.* at 346-48, 112 S. Ct. at 2523. This “actual innocence” inquiry, thus, must be carefully focused on mitigating evidence related to the legal factors that render a capital defendant eligible for a death sentence. *Rocha v. Thaler*, 619 F.3d 387, 405 (5th Cir. 2010). We recently explained this actual-innocence inquiry at length:

When a claim of actual innocence contests a sentence of death, the habeas petitioner’s claim must tend to negate not just the jury’s discretion to impose a death sentence but the petitioner’s very eligibility for that punishment. That is, a habeas petitioner who is unquestionably eligible for the sentence received can never be actually innocent of the death penalty. This is so because late-arriving constitutional error that impacted only a jury’s sentencing discretion is not sufficiently fundamental as to excuse the failure to raise it timely in prior state and federal proceedings. The actual innocence requirement must, then, focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being

introduced as a result of a claimed constitutional error.

*Id.* at 405 (internal quotations and citations omitted). Thus, if a defendant is eligible for the death penalty, the actual-innocence inquiry does not take into account the [429] entire universe of potential mitigating evidence that a defendant may seek to present that could have affected a jury's discretion to impose the death penalty. *Id.*<sup>12</sup>

The "new" mitigating evidence on which Trevino relies relates primarily to his difficult, abusive childhood and his struggles with alcohol and illegal substances.<sup>13</sup> The subject matter of this evidence is some-

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<sup>12</sup> See also *Haynes v. Quarterman*, 526 F.3d 189, 195 (5th Cir. 2008) ("The 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of claim of constitutional error.").

<sup>13</sup> As described by the district court, this "new" mitigating evidence can be summarized as follows:

- (1) the petitioner's mother was an emotionally unstable, physically abusive alcoholic who abused alcohol throughout her pregnancy with petitioner; (2) petitioner weighed only four pounds at birth and required considerable hospital care during his first few weeks of life; (3) for the rest of his life, petitioner suffered from the deleterious effects of Fetal Alcohol Syndrome, as well as his mother's physical and emotional abuse; (4) petitioner suffered numerous serious head injuries as a child for which he received little or no medical care due to the neglect of his mother and the absence of his father; (5) petitioner was exposed to alcohol and drug abuse from an early age and began abusing both alcohol and marijuana himself before he reached age twelve; (6) petitioner became involved in street gangs and street crime by age twelve;

what cumulative of the testimony of Trevino's aunt, who testified that Trevino had experienced difficulties involving the absence of his father and his mother's alcohol problems. But the volume of new evidence identified by Trevino is much greater than what was presented by his trial attorneys. Notwithstanding the volume of this potentially mitigating evidence or the effect it might have had on the jury's sympathies, this evidence does not satisfy the demanding standard of "actual innocence" because it bears no relationship to Trevino's eligibility for the death penalty.

The evidence presented during the guilt/innocence phase of trial, combined with the evidence presented during the sentencing phase, rendered Trevino legally eligible for the death penalty. Trevino became eligible for the death penalty during the sentencing phase on the jury's affirmative answer to the special question asking whether Trevino represented a continuing threat to society. *See* TEX. CODE CRIM. P. ART. 37.071 § 2(b) (2011).<sup>14</sup> The potential mitigating evidence Trevino discusses would have had no appreciable effect on the jury's decision regarding this future dangerousness question.

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(7) petitioner experienced a lifetime of adversity, disadvantage, and disability; (8) petitioner attended school irregularly and performed poorly in school; and (9) petitioner suffers from impaired cognitive abilities.

*Trevino*, 678 F. Supp. 2d at 467.

<sup>14</sup> A criminal defendant's eligibility for the death penalty requires the jury to "convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S. Ct. 2630, 2634-35 (1994) (internal citation omitted).

Ample evidence was presented during the guilt/innocence phase of trial entitling the jury to determine that Trevino represented a continuing threat to society. Much of the testimony arrayed against Trevino indicated future dangerousness, including Gonzales's testimony that Trevino made callous, menacing comments following Salinas's murder such as "I learned how to use a knife" and "I learned how to kill in prison." The prosecution also presented additional evidence regarding Trevino's future dangerousness such as Trevino's past convictions for various crimes, [430] including unlawful possession of a handgun; his membership in a notorious street gang; and tattoos indicating that he closely identified himself with this gang.

None of the new mitigating evidence Trevino discusses—which relates primarily to the circumstances of his childhood—would have been relevant to the jury's consideration of Trevino's future threat to society. As the district court pointed out, if anything, this type of mitigating evidence is "double-edged," in that it could just as easily be interpreted to support the conclusion that Trevino represents a future danger as it could be interpreted to undermine such a conclusion.

Furthermore, Trevino's argument that this new mitigating evidence would have rendered him ineligible for the death penalty pursuant to the jury's second special question at the sentencing phase is without merit. In Texas's capital sentencing scheme, the second special question permits the jury to make an individualized determination of the defendant's moral culpability by considering the circumstances of his offense as well as his character and background. *See* TEX. CODE CRIM. P. ART. 37.071 § 2(e)-(f) (2011). This question implicates the jury's discretion to impose the death penalty and, thus, is viewed as a "selection" issue rather than an

"eligibility" issue in the parlance of the Supreme Court's death-penalty jurisprudence. See *Tuilaepa*, 512 U.S. at 971-73, 114 S. Ct. at 2634-35. As with other "actual innocence" claims that we have rejected, Trevino's argument simply "reduces to an assertion that mitigating evidence could have influenced the jury's discretion in considering a sentence of death; he does not argue that this evidence would have rendered him ineligible for the death penalty." *Rocha*, 619 F.3d at 405.<sup>15</sup>

Accordingly, Trevino fails to satisfy the actual-innocence standard. The "fundamental miscarriage of justice" exception to the prohibition against habeas review of procedurally barred claims, therefore, does not apply to Trevino's claim regarding ineffective assistance of counsel.

#### V.

For the foregoing reasons, we conclude that a COA is not warranted for any of the five issues that Trevino has raised on this petition; moreover, the district court correctly denied relief on the three claims on which the district court granted COA. Accordingly, we AFFIRM the district court's order denying habeas relief to Trevino.

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<sup>15</sup> See also *Haynes*, 526 F.3d at 195 ("The evidence that was allegedly not presented during Haynes's sentencing deals exclusively with mitigating evidence and this evidence does not show that Haynes was actually innocent of a death-eligible offense.").



DENNIS, Circuit Judge, dissenting.

Sam Rey, an accomplice to the rape and murder of Linda Salinas on June 9, 1996, gave a detailed, sworn, written statement to police on June 12, 1996, which completely exculpated Carlos Trevino. This statement by Rey contradicted the testimony of Juan Gonzales, the state's chief prosecution witness, who said that Trevino participated in the rape and shortly after the crime, Trevino made statements to Rey, Gonzales, and others inculcating himself in Salinas' murder. In his federal habeas petition, Trevino contends that the state failed to disclose Rey's June 12th written statement in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and that if the statement had been disclosed and available, his attorneys failed to discover and use it, rendering their assistance ineffective in violation of [431] *Strickland v. Washington*, 466 U.S. 668 (1984). The majority concludes that Trevino is not entitled to habeas relief because Rey's June 12th statement is not "material" under *Brady* and *Strickland*. The majority reasons that Rey's statement is not material because the prosecutor in Trevino's trial would have used a subsequent, June 13th, written statement by Rey, which inculpated Trevino, to contradict Rey's earlier June 12th statement. However, that later statement does not appear anywhere in the record before the district court in this case; indeed, the majority has produced it *sua sponte* by going outside of the record in this case, to a record of another state court case to which Trevino was not a party. Neither the state nor Trevino had ever before mentioned Rey's June 13th statement, let alone litigated the significance of it—for all we know, neither Trevino nor the state's attorneys in Trevino's criminal trial, nor the state's attorneys in Trevino's habeas proceedings, has ever seen or heard of this statement be-



fore the majority *sua sponte* obtained a copy of it after this appeal was fully briefed.

I respectfully disagree with the majority's course in taking judicial notice of Rey's June 13th written statement and using it to resolve this case on its merits. The majority provides no authority that permits us, without request or agreement of the parties, to go outside of the record before the district court, to a state court record of a different case, of a different defendant, to find a statement by a non-party witness who did not testify at the petitioner's trial. Moreover, the majority makes a determination that Rey's June 13th statement is more truthful than his June 12th statement, and therefore is a retraction of it; however, such a credibility determination is not a kind of fact that may be judicially noticed, *viz.*, a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Rather than using judicial notice to improperly supersede Rey's June 12th statement with his June 13th statement that was not part of the district court's record, we should vacate the district court's judgment and remand the case for an evidentiary hearing or stipulations of the parties as to the context and circumstances surrounding Rey's June 12th and 13th statements and for decisions upon the issues arising out of them. I do not share the majority's confidence in their ability as appellate judges with nothing but a paper record to neatly reconstruct the likely outcome of this case had all of Rey's statements been disclosed to defense counsel before trial, since Rey's third statement, upon which the majority so heavily relies in affirming the death penalty, has never

been introduced or subjected to any trial court adversary proceedings in this case. Accordingly, I respectfully dissent.

I.

Carlos Trevino was convicted by a Texas jury of the June 9, 1996, sexual assault and murder of Linda Salinas in San Antonio, and sentenced to death. The state's case at the guilt-innocence phase of Trevino's trial hinged on the testimony of Juan Gonzales. He testified that Trevino and three other young men, Santos Cervantes, Sienido (Sam) Rey, and Bryan Apolinar picked up Salinas at a gas station and drove her to Espada Park where they sexually assaulted her; that Cervantes alone had lured Salinas into the car; that Gonzales had seen Cervantes with a knife before Salinas' murder and Cervantes told Gonzales that he had disposed of the knife after Salinas' murder; that Gonzales heard Cervantes say something about a knife in the car after Salinas was killed; and that [432] Gonzales believed Cervantes killed Salinas. Gonzales also testified that after the sexual assault, he heard Cervantes and Apolinar say, "we don't need no witnesses," and Trevino say, "we'll do what we have to do"; that he left before Salinas was stabbed, but shortly afterwards, he saw blood on Trevino and Cervantes; and that as the five men drove away from the park, Cervantes said it was "cool" or "neat" how Trevino had "snapped" Salinas' neck, and Trevino responded that he had "learned how to kill in prison." The prosecutor relied heavily on Gonzales' testimony about Trevino's statement in the car to argue to the jury that Trevino was the actual killer. At the sentencing phase of the trial, the state again rested its case heavily on Gonzales' testimony that after Salinas murder Trevino said that he had "learned how to kill in prison."

On March 25, 1998—nearly nine months after Trevino's conviction—Rey pleaded guilty to murder and received a fifty-year sentence.<sup>1</sup> On May 5, 1998, Cervantes pleaded guilty to capital murder and received a life sentence.<sup>2</sup> Apolinar went to trial and was convicted of aggravated sexual assault.<sup>3</sup> Gonzales, the only one of the group who testified against Trevino, was not charged.

During his federal habeas proceedings, Trevino's counsel uncovered a sworn, written statement that Sam Rey gave to Detective Barry Gresham, the lead detective investigating Salinas' murder, on June 12, 1996, three days after Salinas was killed. That statement, which is attached to Trevino's federal habeas petition, reads in its entirety<sup>4</sup>:

My name is Seanido Rey I was born on XXXX-75. I am 20 years old. I live at XXXX with my sister the phone number is XXXX.

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<sup>1</sup> See *State v. Rey*, No. 97-CR-1717C (290th Dist. Ct., Bexar Cnty., Tex. Mar. 25, 1998) (criminal docket sheet entry); see also Tex. Pen. Code § 19.02.

<sup>2</sup> See *State v. Cervantes*, No. 97-CR-1717B (290th Dist. Ct., Bexar Cnty., Tex. May 5, 1998) (criminal docket sheet entry); see also Texas Pen. Code § 12.31 ("An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for ... life without parole.").

<sup>3</sup> See *Apolinar v. State*, No. 04-99-00644-CR, 2000 WL 1210922 (Tex. Crim. App. Aug. 16, 2000) (unpublished); see also Tex. Pen. Code § 19.03.

<sup>4</sup> The statement is quoted as it appears in the record, including any orthographic irregularities.

I have already given Det. Gresham a statement, but I would now like to tell the truth of what really happened on last Sunday night.

Everything I said was true about what happened up to the part when we were at the Pic Nic. While we were there I saw a girl talking on the telephone. Santos was talking to her. Det. Gresham showed me a picture of a girl and this was the same girl I saw on the telephone. I signed and dated this photograph. When I went to the car the girl Det. Gresham told me was named Linda came also she was with Santos. We all got in the car with Linda. Linda was in the front right seat sitting in Santo's lap. [Bryan<sup>5</sup>] was driving the car and I was sitting in the back of the [433] car in the middle. Carlos was sitting to the right of me and [Juan<sup>6</sup>] was on my left. When we left the store Linda and Santos was kissing. [Bryan] went to Mission Rd. and went towards Military Hwy. We then went by a park called Espada. Before we got to the park I saw Santos throw a bra to [Bryan] that Linda had taken off. [Bryan] threw the bra out of the car before we stopped.

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<sup>5</sup> Rey referred to the owner of the car as "Jason" in his first statement to Det. Gresham and in this statement. In a later statement he "stated [that] he had been confused about the name of the driver of the car and remembered now the driver's name is Bryan not Jason." In order to avoid confusion, I have changed "Jason" in Rey's quoted statement to "[Bryan]."

<sup>6</sup> In several of the suspects' statements, Juan Gonzales was referred to as "Thatie" or "Tati." See *Trevino v. Thaler*, 678 F. Supp. 2d 445, 460 (W.D. Tex. 2009). Again, to avoid confusion, I have changed "Thatie" in Rey's quoted statement to "[Juan]."

[Bryan] then parked the car in a parking lot. The whole time we were driving out there Santos and Linda were making out. When we stopped the car Santos and Linda got out. I saw they were holding hands. I knew that he was going to have sex with her. I saw them walking towards the woods. I saw they walked down toward the creek. We all got out and was standing against the car listening to the radio. I never heard any noise coming from the creek. About ten or fifteen minutes later Santos came back from the creek. I think when all this was happening was about 10:30 or so at night but I didn't look at a watch. When Santos comes back up the creek I asked him where the girl was at. He told me "Fuck that bitch, she didn't want to give it up so I stabbed her". I asked him why he did that and I don't remember what he said. Everybody else was close when he said this and I think they heard him also. We then just all get back into the car and leave. We then went to Santo's friends house. On the way ever[y]body was quiet and was not talking about what happened. Santo's friends house is on S. Flores street somewhere but I'm not sure where. When we get to the house Santos tells us to just be quiet about what had happened. I was just in shock about what had happened and didn't say anything. The house is gang house and there was alot of guys and girls there just hanging out. We just drank beer and hung out. We stayed there to about 3:00 in the morning and then [Bryan] took me [Juan] and Carlos back to Carlos's house. [Bryan] and Santos then left they didn't say where they were go-



ing. I don't know Santos last name but I have agreed to take you to the house that we picked him up at. This guy named [Bryan] is a friend of [Juan] I don't know his last name or where he lives.

I have read the above statement and It's true and correct.

Also attached to Trevino's federal habeas petition are affidavits from Trevino's two trial attorneys in which they swore that they had never seen this written statement by Rey before Trevino's trial. One of the attorneys swore that Rey's statement "was never produced or shown to us" before Trevino's trial; and the other attorney swore, "I do not recall seeing ... the June 12, 1996 statement of Seanido Rey prior to 2006, and certainly never saw [it] prior to trial in June 1997."

The habeas record in this case also includes a report by Det. Gresham, dated a little more than a month after the crime. The report details Det. Gresham's investigation of Salinas' murder, and includes a summary of three purported statements by Rey. Det. Gresham's summary of Rey's purported first statement says that Rey "read the statement he had given me and signed it," indicating that a separate written statement existed. The summary of Rey's purported second statement provides a brief recapitulation of the sworn, written statement reproduced above, but [434] does not include the rich detail of Rey's written statement. For instance, Det. Gresham's summary leaves out critical facts, such as Rey's statement that "[o]n the way [to Santos' friend's house] ever[y]body was quiet and was not talking about what happened," which contradicts Gonzales' testimony that Trevino had made incriminating statements during that car ride. There is also noth-



ing in Det. Gresham's report that suggests that Rey swore to, and signed a separate, full written statement—as opposed to simply giving Det. Gresham an oral statement. Det. Gresham's summary of Rey's purported third statement contradicts parts of Rey's second statement and includes inculpatory allegations against Trevino. As with Det. Gresham's summary of Rey's purported second statement, the summary of Rey's purported third statement in no way indicates that a separate, written statement existed. Attached to Trevino's federal habeas petition are affidavits from Trevino's trial attorneys in which they swore that they could not remember having seen Det. Gresham's report before Trevino's trial.

Trevino raised two claims for habeas relief based on Rey's second written statement: (1) The state's failure to disclose this statement violated *Brady*; and, (2) if the state did not in fact suppress this statement, Trevino's trial counsel's failure to uncover it and utilize it violated Trevino's right to the effective assistance of counsel under *Strickland*. These two contentions share an overlapping element: materiality of the evidence. See *Brady*, 373 U.S. at 87 (suppressed evidence must be "material"); *Strickland*, 466 U.S. at 694 (explaining that a claim of ineffective assistance of counsel requires a showing of "prejudice," and that "the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution"); see also *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006). In *United States v. Bagley*, the Supreme Court expressly adopted "the *Strickland* formulation of the ... test for materiality" for *Brady* claims. 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); see *Cone v. Bell*, 129 S. Ct. 1769, 1783 (2009). Therefore, Trevino must make the same show-

ing of the materiality of Rey's second statement for his *Brady* claim and for his *Strickland* claim. That is, Trevino must show that Rey's statement "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

The district court concluded that Trevino failed to show that Rey's statement was material and therefore denied habeas relief for both phases of Trevino's trial without reaching the other component of either the *Brady* or *Strickland* claims—whether the statement was suppressed under *Brady* or whether Trevino's trial counsel's performance was objectively unreasonable under *Strickland*. Therefore, the only issue before us on Trevino's *Brady* and *Strickland* claims is whether Rey's statement is material.

After this appeal was fully briefed, the majority, *sua sponte*, requested the state court record for Rey's murder conviction. That record contains three written statements by Rey, the second of which forms the basis of Trevino's claims in this case, and is the only written statement by Rey that was introduced into the habeas record before the district court. The other two statements do not appear in the district court record in this case and have never been addressed or litigated by the parties. Nonetheless, the majority now reasons [435] that it can take judicial notice of Rey's third (June 13th) statement, and give credit to it in lieu of Rey's second (June 12th) statement. In my view, that course is not supported by precedent or authority.

## II.

To conclude that Rey's second statement is not material, the majority takes judicial notice of a third written statement by Rey, which the majority has produced

*sua sponte* from a state court record for a different case to which Trevino was not a party. The majority reasons that “[i]f Trevino’s lawyers had been successful in introducing Rey’s second statement” to question Trevino’s guilt, then “the prosecution undoubtedly would have introduced Rey’s third statement” to undermine that defense; and, likewise, that if “Rey had attempted to testify at Trevino’s trial to the facts contained in his second statement, the prosecution would have undoubtedly impeached Rey with his third statement to the police.” Majority Op. 424. The majority’s reliance on Rey’s third statement is a significant error because (A) the parties have never had an opportunity to litigate the significance or veracity of that statement; (B) the credibility determinations that the majority draws from that statement are not the proper subject of judicial notice; and (C) even assuming *arguendo* that we could take judicial notice of Rey’s third statement, it would not necessarily prevent the defense counsel in a hypothetical retrial from effectively using Rey’s second statement as tending to exculpate Trevino and challenge the credibility of the state’s witnesses against him in the guilt and penalty phases of his capital murder trial.

#### A.

The majority *sua sponte* produced Rey’s third written statement, without any request or agreement by the parties, from a state court record of a different case to which Trevino was not a party. It was not part of the record before the district court, as the majority acknowledges, Majority Op. 421 n.3, nor was it ever once mentioned by the parties below or on appeal. For all we know, neither Trevino nor the state’s attorneys in Trevino’s criminal trial nor in his habeas proceedings has even seen or been informed of this statement. It

certainly stands to reason that if the state's attorneys in Trevino's case had been aware of this statement, as the majority's argument presupposes, then they would have relied upon it in responding to Trevino's habeas petition; but they did not. As such, the parties have never litigated the admissibility or relevance of that statement to Trevino's *Brady* and *Strickland* claims.

## B.

The majority contends that we can *sua sponte* take judicial notice of the statement. Majority Op. 421 n.3. However, that is not allowed by Federal Rule of Evidence 201, which governs judicial notice in the district courts as well as in the courts of appeals. See Fed. R. Evid. 201(f) ("Judicial notice may be taken at any stage of the proceeding."); see also 21B Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5110.1, at 299 (2d ed. 2005) ("Rule 201(f) does not distinguish between taking judicial notice on appeal and appellate review of the trial court judicial notice.... [It] places the appellate court under the same limitations as the trial judge whether the appellate court is reviewing trial court notice or noticing facts for the first time."); 1 Jack B. Weinstein, *Weinstein's Federal Evidence* § 201.32 (2011) ("Because Rule 201 authorizes the taking of judicial notice 'at any stage of the proceeding,' judicial notice [436] may be taken by an appellate court.... However, appellate courts are still subject to the limitations imposed by Rule 201 on the types of facts that may be judicially noticed and the procedures for noticing them.").

Rule 201 provides, in relevant part:

**(a) Scope of rule.** This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When discretionary.** A court may take judicial notice, whether requested or not.

(d) **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

The majority's taking judicial notice of Rey's third written statement in order to conclude that it retracts and makes immaterial Rey's second statement, is not authorized by law; it judicially notices a kind of adjudicative fact that courts may not take notice of under Federal Rule of Evidence 201. The majority's contention is that the prosecutors would have used Rey's third statement to undermine any beneficial use defense counsel could have made of Rey's second written statement, and thus, that the second statement is immaterial. To reach this conclusion requires the majority to take notice of the following facts: that Rey made



a third written statement; that he made it before Trevino's trial; that the prosecutors in Trevino's case were aware of the existence of that written statement at the time of Trevino's trial; that the prosecutors in Trevino's trial would have used that statement if defense counsel had called Rey as a witness or used his second written statement to attack the state's case; and that the jury would have given credit to Rey's third written statement in lieu of his second written statement.

However, these facts are "subject to reasonable dispute" and are not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Therefore, they are not the "kinds of facts" of which Rule 201 allows a court to take judicial notice. Based on the record before the district court, supplemented by the record from Rey's state court criminal proceeding, we cannot properly know or judicially notice whether the state's attorneys in Trevino's criminal trial were aware of Rey's third statement. (The prosecutor in Rey's case was not the same as in Trevino's case.) It is not at all certain that the state's attorneys would have known of or resorted to using Rey's third statement at trial, because they did not use it or even mention it in Trevino's federal habeas proceedings. Moreover, the majority's argument rests on an improper determination of the relative truthfulness of one statement by Rey vis-à-vis another by him. However, the truth of a statement is not a proper matter for judicial notice. See Wright & Graham, *supra*, § 5106.4, at 231-36 ("It seems clear that a court cannot notice pleadings or testimony [in court records] as true simply [437] because these statements are filed with the court.... [A] court cannot take judicial notice of the truth of a document simply because someone put it in



the court's files .... [Courts] can notice [that an] assertion was made, but not that it was true ....").

The majority's *sua sponte* course of taking judicial notice here also conflicts with Rule 201's requirement that the parties be heard on the court's taking judicial notice, and it will not prevent another round of litigation regarding Rey's third statement. Instead, as the majority concedes, *see* Majority Op. 421 n.3, it will put the parties in the untenable position of litigating an issue of fact in a petition for rehearing in an appellate court.<sup>7</sup> Rule 201 entitles the parties "upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." Fed. R. Evid. 201(e); *see also id.* advisory committee note (1972) ("Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed."). This rule applies in the appellate courts as much as it does in the district courts. *See* Wright & Graham, *supra*, § 5110.1, at 299-300 ("[T]he appellate court must follow the procedures in Rule 201(e) in giving the parties an opportunity to be heard."); Weinstein, *supra* ("[A]ppellate courts are still subject to the limitations imposed by Rule 201 on the types of

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<sup>7</sup> The majority offers the following placebo: "[W]e afford [Trevino] the right to raise any objections he may have by means of a petition for rehearing, which objections we will consider filed before our opinion issued." Majority Op. 421 n.3. I fail to understand what effect this has as Trevino unquestionably has the right to raise "each point of law or fact that [he] believes the court has overlooked or misapprehended" in a petition for rehearing. Fed. R. App. P. 40. This does not alleviate, however, the problem of litigating a fact issue for the first time in a petition for rehearing in an appellate court.

facts that may be judicially noticed and the procedures for noticing them.... An appellate court contemplating original judicial notice should notify the parties so that the propriety of taking notice and the tenor of the matter to be noticed can be argued. If oral argument has already been completed, the court should, at a minimum, afford the parties an opportunity to submit supplemental briefs." (footnote omitted) (quoting *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977), as saying, "The parties were given an opportunity to comment on the propriety of our taking notice of the license, and both sides agreed that we could properly do so.")). Rule 201 also provides that "[i]n the absence of prior notification, the request may be made after judicial notice has been taken." Fed. R. Evid. 201(e). The majority has not given the parties an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed, and therefore, they will be forced to litigate this issue for the first time in a petition for rehearing.

Finally, the majority's only supporting authorities for taking judicial notice of Rey's third statement are inapposite. The majority cites *Brown v. Lippard*, 350 F. App'x 879 (5th Cir. 2009) (unpublished), but *Brown* is nothing like this case. There, we took judicial notice merely of a "docket entry establishing the existence of the 2001 transcript" of a court proceeding. *Id.* at 882 n.2. Here, the majority takes judicial notice of facts that are subject to reasonable dispute, and are not analogous to the fact that a court docket entry exists. Nor is the majority's reliance on *Moore v. Estelle*, 526 F.2d 690 (5th Cir. 1976), any more persuasive. There, we said quite plainly that we will "take judicial notice of prior habeas proceedings brought by this [438] appellant in connection with the same conviction." *Id.* at 694

(emphasis added). Of course, Sam Rey's state court criminal proceedings are not "prior habeas proceedings brought by [Carlos Trevino] in connection with [Trevino's] conviction." *Id.* Indeed, the majority concedes this point when it describes "our routine practice in *habeas* appeals" as "taking judicial notice of all related proceedings *brought by the appellant*, including state proceedings, even when the prior state case is not made a part of the record on appeal." Majority Op. 421 n.3 (emphasis added) (internal quotation marks omitted). Therefore, the majority has provided no relevant authority for its *sua sponte* decision to take judicial notice of facts outside of the record on appeal in this case and contained in a record in a state court proceeding for a different case of a different defendant.

### C.

Assuming *arguendo* that the majority lawfully could take judicial notice of Rey's third statement, the existence of that statement does not prevent defense counsel from arguing that the state's suppression of Rey's second written statement casts a different light on Trevino's capital murder trials so as to undermine confidence in those proceedings. Rey's third written statement shows that Rey was not even present when Salinas was killed and, therefore, could not credibly say who stabbed Salinas. Nor it does it contradict the portion of Rey's second statement in which he said that nobody, including Trevino, said anything in the car following Salinas' murder. See Majority Op. 419-20 (quoting Rey's third written statement). Therefore, Rey's second statement would stand unchallenged in contradicting the critical aspect of Gonzales' testimony that in the car after Salinas' murder, Cervantes said it was "cool" or "neat" how Trevino had "snapped" Salinas'

neck, and that Trevino responded that he had "learned how to kill in prison."

### III.

For these reasons, the fair and proper course would be for the majority to vacate the judgment and remand this case to the district court to consider all of Rey's statements and any additional evidence relevant thereto, and to determine whether all of that evidence undermines confidence in Trevino's capital murder guilt and penalty trials. It is clear that on the record before the district court, Rey's second statement is material—otherwise, the majority would not have found it necessary to commit serious legal error by *sua sponte* going outside of the district court's record to take notice of facts not judicially noticeable under Federal Rule of Evidence 201 in order to reach the contrary conclusion. Moreover, as I explain *infra* in Part IV.A, Trevino's trial attorneys could have put Rey's second statement to good use to cast doubt on his guilt, and the record before us is insufficiently developed for us to decide whether Rey's third statement actually would have eviscerated defense counsel's every use of Rey's second statement in Trevino's guilt and death penalty trials. Therefore, in my view, it is necessary to remand this case because now that Rey's third statement has been produced, the parties should be allowed an opportunity to litigate the significance of that statement, specifically, whether it undermines the materiality of Rey's second statement, and the district court should reconsider this case in light of those arguments and all of the available relevant evidence.

When the Eleventh Circuit was confronted with a similar situation—i.e., whether to consider extrarecord evidence that may have been significant in resolving

the habeas petitioner's claim—that court [439] remanded to the district court to first find the necessary facts. *See Ross v. Kemp*, 785 F.2d 1467, 1477 (11th Cir. 1986). In contrast, the majority simply assumes the facts that it thinks the district court would have found after a full and fair hearing, providing no authority for its course of action, and plainly stepping beyond the bounds of its limited authority to judicially notice certain kinds of facts under Federal Rule of Evidence 201. The majority's course is unfair for the resolution of a highly controversial issue based on uncertain evidence from murky and questionable, self-interested recollections of death penalty defendants. I would instead follow the course taken by the Eleventh Circuit and remand this case to the district court to allow the parties to litigate the issues given rise to by the state's apparent suppression of Rey's second and third statements.

#### IV.

In concluding that Rey's second statement was not material the majority also errs, in my view, by (A) reasoning that Rey's second statement "would likely have been inadmissible," and ignoring the substantial use that Trevino's trial attorneys could have made of that statement even without admitting it into evidence; (B) purporting to make a factual finding that the state did not suppress Rey's statement, a finding which is the subject of a factual dispute that the district court expressly left unresolved; (C) concluding that Rey's statement was not material because "the evidence presented at Trevino's trial supports the jury's verdict of conviction under Texas's law of the parties." Majority Op. 425.



## A.

The majority mistakenly asserts that "Rey's [second] written statement would likely have been inadmissible." Majority Op. 424 n.7. This is perplexing considering that the majority expressly acknowledges that "inadmissible evidence may be material under *Brady*." *Spence v. Johnson*, 80 F.3d 989, 1005 n.14 (5th Cir. 1996) (citing *Sellers v. Estelle*, 651 F.2d 1074, 1077 n.6 (5th Cir.1981)); see Majority Op. 424 n.7 (citing *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999)). Indeed, this court has often "reaffirm[ed] that 'inadmissible evidence may be material under *Brady*.'" Thus, we ask only the general question whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different." *Felder*, 180 F.3d at 212 (citations omitted) (quoting *Spence*, 80 F.3d at 1005 n.14); see also *United States v. Brown*, 650 F.3d 581, 588 & n.12 (5th Cir. 2011) ("The suppressed evidence need not be admissible to be material under *Brady*; but it must, somehow, create a reasonable probability that the result of the proceeding would be different." (citing *Felder*, 180 F.3d at 212)); *Spence*, 80 F.3d at 998, 1005 n.14 (same); *Sellers*, 651 F.2d at 1077 n.6 (same); *Martinez v. Wainwright*, 621 F.2d 184, 188 (5th Cir. 1980) (holding that evidence was material even if it "were held to be hearsay and not admissible" because "it at least would have provided the defense the ability to contact the appropriate" people to gather the evidence in admissible form). Moreover, in *Wiggins v. Smith*, 539 U.S. 510 (2003), the majority of the Supreme Court squarely rejected Justice Scalia's dissenting view that because undiscovered mitigation evidence was likely inadmissible under state law during the punishment phase of a capital murder trial, it was not material under *Strickland*. See 539



U.S. at 536; *id.* at 554-57 (Scalia, J., dissenting). Writing for seven members of the Court, Justice O'Connor explained, "had [440] the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence. *In reaching this conclusion[]*—that the evidence was material under *Strickland*—"we need not, as the dissent suggests, make the state-law evidentiary findings that would have been at issue at sentencing." *Id.* at 536 (majority opinion) (emphasis added) (citation omitted).

In *Sellers*, under extremely similar circumstances as this case, we also rejected the contention that evidence must be admissible to be material under the *Brady-Strickland* standard. 651 F.2d at 1077 n.6. There, the suppressed police reports included a written statement of a friend of Santos Cantera, which alleged that Cantera had told him that Cantera was the actual killer. *Id.* at 1075-77. The lower court held that the evidence was immaterial in part because this statement was inadmissible. *Id.* at 1076, 1077 n.6. We held that "[s]uch a conclusion [was] unwarranted," and explained why the written statement of Cantera's friend, although apparently inadmissible, was still material: "First, by enabling the defense to examine [the suppressed evidence], *Sellers* may have been able to produce witnesses whose testimony or written statements may have been admissible. *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980). Second, the evidence ... suppressed was material to the preparation of [*Sellers*] defense, regardless of whether it was intended to be admitted into evidence or not." *Sellers*, 651 F.2d at 1077 n.6; see also *Spence*, 80 F.3d at 998 ("The district court concluded that the undisclosed evidence was not material be-cause under Texas law it would not have

been admissible at trial. The Fifth Circuit has expressly found otherwise in *Sellers v. Estelle*," 651 F.2d 1074 (5th Cir. 1981).).

For substantially similar reasons, Rey's second statement would have been extremely useful to Trevino's trial attorneys regardless of whether it was admissible. First, Rey's second statement may have led Trevino's counsel to call Rey to testify in contradiction to Gonzales' testimony, particularly his testimony about the statements Trevino allegedly made in the car after Salinas was killed. See *Kyles*, 514 U.S. at 445-46 (discussing the possibility of defense counsel calling "as an adverse witness" an alternative suspect whose statements had been suppressed); *Sellers*, 651 F.2d at 1077 n.6; *Martinez*, 621 F.2d at 188 ("If the [suppressed] rap sheet were held to be hearsay and not admissible to prove the [state's witness's] prior convictions, it at least would have provided the defense the ability to contact the appropriate penal facilities to acquire an official record which would have been admissible."). This, in fact, is exactly what Trevino's trial counsel swore that he would have done with Rey's written statement: "I would have definitely used it ... to further discredit Juan Gonzales ...." Thus, the majority is simply mistaken that "[n]othing in the record remotely suggests that disclosure of the full text of Rey's second statement would have changed th[e] strategic calculation made by Trevino's attorneys." Majority Op. 426. The majority's only reason for why this does not make Rey's second statement material is

based on its mistaken reliance on Rey's third statement.<sup>8</sup>

[441] Second, Rey's second statement was important to the preparation of Trevino's defense, regardless of whether it was intended to be admitted into evidence or not. See *Sellers*, 651 F.2d at 1077 n.6. As the Court explained in *Kyles*, competent counsel "could have examined [Det. Gresham] to good effect on [his] knowledge of [Rey's out-of-court] statement[] and so have attacked the reliability of the investigation." 514 U.S. at 446.<sup>9</sup> That is, competent counsel could have used Rey's second statement to cast particular aspersion on Cervantes as the only person culpable for Salinas' mur-

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<sup>8</sup> The majority concludes that "[i]n the extremely unlikely event that Rey had attempted to testify at Trevino's trial to the facts contained in his second statement, the prosecution would have undoubtedly impeached Rey with his third statement," Majority Op. 424; by which the majority seems to mean that in their view, the jury would have certainly believed the contents of Rey's third statement and not his live testimony to the contrary. However, as I explained in Part II.B, this credibility determination is based on taking judicial notice of Rey's third statement, and such a credibility determination is not a kind of fact that may be judicially noticed. See Fed. R. Evid. 201(b) (Providing for judicial notice of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

<sup>9</sup> There would be no hearsay problem in using Rey's statement to attack the credibility of Det. Gresham's investigation since "[h]earsay" is a statement ... offered in evidence to prove the truth of the matter asserted." Tex. R. Evid. 801(d). Rey's statement would not have been offered into evidence, and it would not have been used to prove the truth of the matter asserted in the statement, but to show that Det. Gresham's investigation was unreliable because it was not thorough, impartial and objective.

der, and to show that Det. Gresham's investigation focused on Trevino, despite Rey's statement exculpating Trevino; and that Det. Gresham never pursued a more rigorous investigation of Cervantes, despite Rey's statement that inculpated only Cervantes. Again, Trevino's trial counsel swore he would have used Rey's statement for this exact purpose, "in the cross-examination of [D]etective Gresham to show the jury that Santos Cervantes and not ... Trevino[] stabbed and killed [Salinas]"; which again contradicts the majority's assertion that "[n]othing in the record remotely suggests that disclosure of the full text of Rey's second statement would have changed th[e] strategic calculation made by Trevino's attorneys." Majority Op. 426. The majority does not address the impact that undermining the investigation would have had on the jury's assessment of the evidence.

"In any event, contrary to the [majority's] assertion, it appears that [Rey's second statement] may have been admissible under [Texas] law." *Wiggins*, 539 U.S. at 536. If Det. Gresham had used Rey's second statement to refresh his memory before testifying at Trevino's trial then Trevino would have been "entitled ... to introduce in evidence those portions which relate to the testimony of the witness." Tex. R. Evid. 612. Of course, Trevino's attorneys were unable to ask Det. Gresham whether he had used Rey's second written statement to refresh his memory because they were unaware of its existence. Therefore, the majority is mistaken that Rey's second statement was inadmissible.

## B.

The majority also mistakenly contends that "the record evidence strongly indicates that the prosecution

did not suppress [Rey's second] statement." Majority Op. 424. However, as the majority admits, whether the state suppressed the statement turns on a factual dispute that the district court did not resolve. Majority Op. 424 n.6.<sup>10</sup> Also, the majority fails to [442] appreciate that in addition to a *Brady* claim, Trevino has raised a *Strickland* claim based on Rey's second statement, viz., if the statement was not suppressed, then his attorneys were constitutionally ineffective in failing to discover the statement. Therefore, even if Rey's second statement was not suppressed, there still exists another unresolved factual question of whether Trevino's attorneys' failure to discover the statement rendered their performance constitutionally deficient.

Moreover, in resolving this factual dispute, the majority seriously errs in its assessment of the evidence regarding the state's suppression of Rey's second statement: (1) The majority ignores the record evidence that Trevino's trial attorneys swore in affidavits that Rey's second statement "was never produced or shown to us" before Trevino's trial, and that, "I ... certainly never saw [Rey's statement] prior to trial in June

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<sup>10</sup> See *Trevino*, 678 F. Supp. 2d at 459-60 ("There are many unresolved factual disputes before this Court concerning precisely what documentation was made available to [Trevino's] trial counsel by the prosecution before and during [Trevino's] capital murder trial. More specifically, there appears to be a genuine issue of material fact regarding whether ... Rey's statement, which indicated Cervantes admitted to Rey that he stabbed Salinas, was ever made available to [Trevino's] trial counsel. It is unnecessary to resolve these disputes because, having reviewed the evidence from both phases of [Trevino's] trial, this Court concludes Rey's statement does not satisfy the 'materiality' prong for purposes of *Brady* analysis."); see also *id.* at 466-67 (addressing only the prejudice prong of Trevino's *Strickland* claim).



1997.” (2) The majority is mistaken that Det. Gresham’s report “should have put defense counsel on notice that Rey had made [a] statement to police to police suggesting that Cervantes stabbed the victim” and that “[t]he onus was then on Trevino’s lawyers to request a copy of the full statement.” Majority Op. 424. Nothing in Det. Gresham’s report suggests that there was a separate, written and signed statement by Rey exculpating Trevino. If anything, Det. Gresham’s report suggests just the opposite: Det. Gresham’s report includes a summary of Rey’s first statement, and notes that Rey “signed the statement.” (R. at 385). However, there is no such indication in the report that Rey signed his *second* statement, the statement that is at the heart of this appeal. Nothing in Det. Gresham’s report should have alerted Trevino’s attorney to the existence of a second, written statement. (3) The state does not even contend that it disclosed Rey’s second statement. See Resp’t Br. 26 (Rey’s second “statement itself may not have been in the State’s file ....”). In sum, if anything, the record evidence indicates that the prosecution suppressed Rey’s second statement.

### C.

Finally, the majority errs by concluding that Rey’s second statement was not material because “the evidence presented at Trevino’s trial supports the jury’s verdict of conviction under Texas’s law of the parties.” Majority Op. 425.<sup>11</sup> The majority reasons that “Rey’s written statements cast no doubt on the substantial, uncontroverted evidence presented during the

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<sup>11</sup> Texas’ law of the parties doctrine is codified in Texas Penal Code § 7.02.



guilt/innocence phase of the trial supporting the conclusion that Trevino acted with intent to commit the offense and aided or attempted to aid other members of the group in commission of Salinas's murder." Majority Op. 425. This is clearly incorrect. Rey's second statement fully exculpates Trevino of any involvement in the rape and murder of Salinas, and thus absolves Trevino of criminal responsibility for her killing, even under Texas' law of the parties. Moreover, Rey's second statement casts doubt on Gonzales' crucial testimony that Trevino made incriminating [443] statements after Salinas' murder, which would have been significant for the jury's determination of whether Trevino was guilty under Texas' law of the parties, that is, whether he "intended to kill [Salinas] or anticipated that a human life would be taken."

This case is distinguishable from *Miller v. Dretke*, 404 F.3d 908 (5th Cir. 2005), another case charged under Texas' law of the parties cited by the majority. Majority Op. 425. In *Miller*, there was "uncontroverted, overwhelming evidence of [the defendant's] involvement in th[e] conspiracy [to commit a robbery] and the nature of the robbery" and the alleged *Brady* evidence merely suggested that the other participant in the robbery, and not the defendant, actually shot the victims. 404 F.3d at 916. Here, by contrast, there was disputed and weak circumstantial evidence that Trevino participated in the assault on Salinas, and the *Brady* evidence indicates that Trevino did not participate in *any* aspect of the crime, not just that someone other than Trevino committed the murder. Therefore, even under Texas' law of the parties, Rey's second statement would have been critical to defense counsel to cast doubt on Trevino's culpability.

## V.

In my view, the majority has fallen into error by taking judicial notice of Rey's third statement and unproven facts related to that statement; and improperly assessing the credibility and weight of those statements, without their surrounding facts and circumstances, and other evidence in this case, in order to render judgment in favor of the state. Now that Rey's third statement has been produced, I would remand this case to the district court to allow the parties an opportunity to litigate the significance of that statement, and consider all of Rey's statements and additional evidence relevant thereto to determine whether all of that evidence undermines confidence in Trevino's capital murder trials. For these reasons, I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 10-70004

---

CARLOS TREVINO,  
*Petitioner-Appellant,*  
*v.*

RICK THALER, DIRECTOR, TEXAS DEPARTMENT  
OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS  
DIVISION,  
*Respondent-Appellee*

---

Appeal from the United States District Court  
for the Western District of Texas

---

*ON PETITION FOR REHEARING AND REHEAR-  
ING EN BANC*

(Opinion 11/14/11, 5 Cir., \_\_\_, F.3d \_\_\_\_)

Before DAVIS, SMITH and DENNIS, Circuit Judges.  
PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P and 5<sup>th</sup> Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

Dennis, J., would GRANT a Panel Rehearing for the reasons assigned in his dissenting opinion and to consider an additional objection and allegations by peti-

tioner's counsel made subsequent to the majority's decision.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis  
United States Circuit Judge

DEC 13 2012

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

CARLOS TREVINO,

*Petitioner,*

*v.*

RICK THALER, DIRECTOR, TEXAS DEPARTMENT  
OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS  
DIVISION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

JOINT APPENDIX VOLUME II OF II  
JA194-581

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NO. MC 904223a

|                |   |                            |
|----------------|---|----------------------------|
| STATE OF TEXAS | § | IN THE DISTRICT<br>COURT   |
| VS.            | § | 290TH JUDICIAL<br>DISTRICT |
| ROBERT TREVINO | § | BEXAR COUNTY,<br>TEXAS     |

***MOTION FOR THE APPOINTMENT OF AN IN-  
VESTIGATOR***

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Robert Trevino, defendant in the above styled and numbered cause, by and through his attorney of record, and respectfully moves this Honorable Court to appoint a private investigator to assist him in the preparation of his defense, and for good cause shows the following:

I.

Defendant is charged with the felony offense of Capital Murder.

II.

Based on his limited investigation in this case, the undersigned counsel knows that there are a number of witnesses who must be sought out and interviewed. This can only be done properly and effectively through the use of a private investigator.

III.

Appointment of a private investigator is necessary to insure that defendant receive his rights to effective assistance of counsel, cross-examination and confronta-

tion, and compulsory process, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution; due process and due course of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I §§ 13, 19 and 29; and, equal protection of the law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, §§ 3 and 3a of the Texas Constitution.

#### IV.

Appointed counsel is entitled to reimbursement for reasonable expenses incurred with prior court approval for purposes of investigation. Tex. Code Crim. Proc. Ann. Art. 26.05(a).

#### V.

Undersigned counsel was appointed to represent the defendant because of his indigence. This indigence prevents defendant from hiring a private investigator to assist in his defense.

#### VI.

Defendant requests that the Court appoint Ed Villanueva, a private investigator, licensed in the State of Texas.

WHEREFORE, PREMISES CONSIDERED, defendant prays that this Court appoint a private investigator to assist him in the preparation of his defense and that the Court order the County Auditor to pay the costs of such investigative services.

Respectfully submitted,

Mario A. Trevino  
315 S. Main  
San Antonio, Texas 78204  
2260026

BY: /s/ Mario A. Trevino  
Mario A. Trevino  
STATE BAR NO.: 20211250

ATTORNEY FOR DEFENDANT

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing Motion For the Appointment of an Investigator was delivered to the District Attorney's Office, at BEXAR COUNTY JUSTICE CENTER, SAN ANTONIO, TEXAS 78205, on 8-12, 1996.

Mario A. Trevino  
315 S. Main  
San Antonio, Texas 78204  
2260026

BY: /s/ Mario A. Trevino  
Mario A. Trevino  
STATE BAR NO.: 20211250

ATTORNEY FOR DEFENDANT

### **ORDER**

On Aug 13, 1996, came on to be heard defendant's Motion For The Appointment Of An Investigator to assist in the preparation of the defense.

This Court, after having read the pleadings and heard argument of counsel, is of the opinion that said motion should be granted:

It is therefore ORDERED, ADJUDGED and DECREED that Ed Villanueva is hereby appointed as the investigator for the defendant.

It is further ORDERED that the said Ed Villanueva, after the conclusion of his investigation be paid up to in the sum not to exceed \$500.00.

SIGNED on Aug 13, 1996.

/s/ Sharon MacRae  
JUDGE PRESIDING

[STAMP:

[illegible]

DISTRICT CLERK  
BEXAR CO. TEXAS

96 AUG 12 AM 1:48

DEPUTY

BY Sylvia P. Ozuna]

## 96-CR-4111-B

|                  |   |                            |
|------------------|---|----------------------------|
| STATE OF TEXAS   | * | IN THE DISTRICT<br>COURT   |
| VS.              | * | 290TH JUDICIAL<br>DISTRICT |
| ROBERT TREVINO . | * | BEXAR COUNTY,<br>TEXAS     |

***MOTION FOR AUTHORIZATION OF PAYMENT  
OF EXPENSES AND FEES FOR INVESTIGA-  
TOR IN EXCESS OF MAXIMUM AUTHORIZED  
FEES***

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES ROBERT TREVINO, defendant, by and through his Attorney of record, MARIO A. TREVINO, moves this court to authorize payment of expense and fee for investigator in excess of maximum authorized fee and for good cause respectfully shows the Court the following:

I

The fee authorized under the current Bexar County fee schedule limits the amount of money available for investigator expense to a maximum of \$500.00.

II

EDWARD C. VILLANUEVA was appointed by the Court to assist the undersigned in the investigation of the facts of this cause. EDWARD C. VILLANUEVA has preformed various investigative duties totaling \$500.00.

## III

The complexity of this case requires an unusual amount of investigation and additional investigation by the appointed Investigator to locate and interview witnesses pertinent to this case is necessary, not only in the guilt and innocent phase but, in the penalty phase should conviction result.

## IV

As the Court knows, Defendant in this cause of action is indigent and is unable to afford the expense of compensating this investigator necessary to his defense. To deny him this right would be an abuse of the discretion by the Court. Additionally, it would deny the Defendant his right to effective assistance of counsel under the Sixth and Fourteenth Amendments of the United States Constitution and Article I \* 10 of the Texas Constitution, and his right to due process and equal protection of law under the Fifth and Fourteenth Amendments of the United States Constitution and Article I \*\* 10 and 19 of the Texas Constitution.

## V

WHEREFORE, PREMISE CONSIDERED, it is prayed that the Court order the payment of expenses and fees in excess of maximum authorized fee to the Court-appointed Investigator.

Respectfully submitted,

/s/ Mario A. Trevino  
MARIO A. TREVINO  
315 S. Main Avenue  
San Antonio, Texas 78204  
State Bar No. 20211250  
Attorney For Defendant



EDWARD C. VILLANUEVA  
 Detect Investigation Company  
 7431 Meadow Breeze  
 San Antonio, Texas 78227-1631

January 24, 1997

96-A45V-0812

Mario A. Trevino  
 315 S. Main Avenue  
 San Antonio, Texas 78204

Re: Robert Trevino  
 96-CR-4111B

Investigative services from 08-13-96 to 01-24-97.

|        |                                                                                                    |
|--------|----------------------------------------------------------------------------------------------------|
| 081396 | Discussed case with Attorney, conducted inquiries S.R. Siendo, C. Trevino. (1.0)                   |
| 081996 | Reviewed Court's file, identified police report. (0.75)                                            |
| 082196 | Purchased police report #96-344353, ID victim. (1.0)                                               |
| 082396 | Conducted newspaper article inquiry. (0.5)                                                         |
| 082696 | Purchased legal documents County Clerk's Office, obtained pen packet C. Trevino 93-CR-6532W. (1.0) |
| 091696 | Interviewed C. Trevino, inquiry witness list. (2.75)                                               |
| 091896 | Inquiry and purchased autopsy report, furnished copy autopsy to Attorney, discussed case. (1.5)    |
| 092096 | Photographed PicNik Store, developed film. (1.25)                                                  |
| 093096 | Interviewed I. Gonzales, J. Gonzales, J. DeLeon. (2.0)                                             |
| 110496 | Reviewed States file with M. Trevino. (1.5)                                                        |
| 110696 | Conducted judicial inquiries B. Apolinar, S. Cervantes, S. Rey, C. Trevino, G. Favella,            |

S. Saldivar, D.G. Luna, J.A. Mata, D.S. Salinas, P. Gil, identified prior felony & misdemeanor convictions. (1.25)

111896 Purchased legal documents County Clerk Office. (1.0)

111986 Obtained pen packet 96-CR-0264-B. (0.75)

120496 Requested 2 pen packets from District Clerk. (0.75)

121896 Participated D.A. Office interview of R. Trevino. (3.5)

122096 Discussed case with Attorney. (0.5)

010997 Obtained pen packet 77CR1911A. (0.5)

(21.5 hrs at \$20.00 per hour) \$ 430.00

Mileage: 081396(13) 081996(13)  
 082196(13) 082696(13)  
 091696(18) 091896(26)  
 092096(31) 093096(13)  
 110696(13) 111896(13)  
 111996(13) 120496(13)  
 121896(13) 122996(13)  
 100997(13)

(231 miles at \$.25 per mile) \$ 57.75

Expenses: (parking) \$ 8.25  
 (purchase police report) \$ 3.40  
 (purchased legal documents) \$ .60

**COST OF PROFESSIONAL SERVICES \$ 500.00**

**State Sales Tax @ .0775 (Exemption #74-2002039) \$ .00**

**TOTAL COSTS \$ 500.00**

/s/ Edward C. Villanueva  
 Edward C. Villanueva  
 Owner-Manager

Exhibit "A"

[STAMP:

[illegible]

97 JAN 28 PM 1:51

DEPUTY

BY [illegible]

96-CR-4111-B

|                |   |                            |
|----------------|---|----------------------------|
| STATE OF TEXAS | * | IN THE DISTRICT<br>COURT   |
| VS.            | * | 290TH JUDICIAL<br>DISTRICT |
| ROBERT TREVINO | * | BEXAR COUNTY,<br>TEXAS     |

On the 4 day of Feb, 1997, came to be considered the aforementioned Motion For Authorization Of Payment Of Expenses And Fees For Investigator In Excess Of Maximum Authorized Fee. After Consideration of same, this Court is of the opinion that the same be (GRANTED) (~~DENIED~~) and now approves the incurring of investigative expenses in a total sum not to exceed \$1000.00, including the \$500.00 previously authorized.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that EDWARD C. VILLANUEVA receive \$500.00 for services already rendered in the above-styled and numbered cause from the State and County.

SIGNED AND ENTERED THIS 4 day of Feb, A.D., 1997.

/s/ Sharon MacRae  
JUDGE PRESIDING

NO. 96-CR-4111B

[handwritten correction: 97CR1717D]

|                          |   |                            |
|--------------------------|---|----------------------------|
| STATE OF TEXAS           | § | IN THE DISTRICT<br>COURT   |
| vs.                      | § | 290TH JUDICIAL<br>DISTRICT |
| ROBERT CARLOS<br>TREVINO | § | BEXAR COUNTY,<br>TEXAS     |

***MOTION FOR DISCOVERY***

[handwritten note:

5/22/97

agreed by State & defense  
SM]**TO THE HONORABLE JUDGE OF SAID COURT:**

Now comes Robert Carlos Trevino, defendant in the above entitled and numbered cause, by and through undersigned counsel, and makes this Motion for Discovery, and, for good cause shows the following:

**I.**

Defendant moves the Court to order the District Attorney to produce and permit counsel for the defendant to inspect the following designated items:

1. All written confessions, admissions and statements, made by the defendant to the state in connection with this case.

(GRANTED) (DENIED)

2. All oral confessions, admissions and statements, made by the defendant to the state

in connection with this case, which have been electronically recorded.

(GRANTED) (DENIED)

3. The substance of all oral confessions, admissions and statements made by the defendant to the state in connection with this case, which were not electronically recorded.

(GRANTED) (DENIED)

4. All statements, written or oral, electronically recorded or not, given by the defendant which are exculpatory or which tend to mitigate punishment.

(GRANTED) (DENIED)

5. All testimony given by the defendant before the grand jury in connection with this offense.

(GRANTED) (DENIED)

6. All written warnings, admonitions, rights and waivers given by the state to the defendant before defendant gave any written or oral statements, admissions or confessions or testimony at any examining trial or grand jury hearing.

(GRANTED) (DENIED)

7. All notes, whether in final, rough, draft, or other form, made by all law enforcement officers prior to, during and after the defendant was interrogated which concern any confessions, admissions or statements

made by defendant to law enforcement officers concerning this case.

(GRANTED) (DENIED)

8. All confessions, admissions or statements given by co-defendants, parties, accomplices or co-conspirators which the state intends to offer into evidence in defendant's trial.

(GRANTED) (DENIED)

9. All confessions, admissions or statements given by co-defendants, parties, accomplices or co-conspirators which tend to exculpate defendant or to mitigate punishment.

(GRANTED) (DENIED)

10. All witness statements as that term is used in Rule 614 of the Texas Rules of Criminal Evidence, whether in final, rough, draft, or other form.

(GRANTED) (DENIED)

11. All writings used to refresh the recollection of witnesses, as provided in Rule 611 of the Texas Rules of Criminal Evidence.

(GRANTED) (DENIED)

12. The names and addresses of all suspects other than defendant who were interrogated or arrested or investigated in connection with this case.

(GRANTED) (DENIED)



13. A list of the names and addresses of all witnesses the prosecution intends to call at trial.

(GRANTED) (DENIED)

14. All statements made by any suspect, party or witness to this alleged offense which tend to exculpate defendant or mitigate punishment.

(GRANTED) (DENIED)

15. The names and addresses of all persons who testified at the grand jury proceedings which culminated in defendant's indictment in this case.

(GRANTED) (DENIED)

16. A written transcription of the testimony of all witnesses who testified at the grand jury proceedings which culminated in defendant's indictment in this case. Defendant is entitled to grand jury testimony upon a showing of "particularized need." Defendant particularly needs the grand jury testimony here requested to cross-examine and impeach the witnesses and to discover and utilize exculpatory and mitigating evidence, including inconsistent and impeaching evidence.

(GRANTED) (DENIED)

17. A written transcription of all exculpatory or mitigating evidence concerning defendant produced in the grand jury proceedings which culminated in defendant's indictment in this case.

(GRANTED) (DENIED)

18. A written transcription of the testimony of all witnesses who testified at the grand jury proceedings which culminated in defendant's indictment in this case, and whom the state intends to call as witnesses at trial. That testimony is a "statement" discoverable under Rule 614 of the Texas Rules of Criminal Evidence.

(GRANTED) (DENIED)

19. All physical evidence seized by the state from the defendant in connection with this case.

(GRANTED) (DENIED)

20. All physical evidence seized by the state from co-defendants, co-conspirators, parties or accomplices, before, during, or after their arrest, in connection with this case.

(GRANTED) (DENIED)

21. All physical evidence, property, documents, papers, books, accounts, letters, photographs, objects, records or tangible things belonging to the defendant which are now in the possession of the state or its agencies.

(GRANTED) (DENIED)

22. All physical evidence in possession or control of the state which the state intends to offer at trial in this case.

(GRANTED) (DENIED)

23. All physical evidence alleged to be the instrumentality of the crime for which defendant stands indicted.

(GRANTED) (DENIED)

24. All physical evidence removed by the state from the scene of the alleged crime.

(GRANTED) (DENIED)

25. All weapons in possession or custody of the state, alleged to have been used by the defendant, co-defendants, co-conspirators, parties, accomplices, complainants or witnesses in this case, including ammunition, shells, cartridges, bullets, slugs, wadding, projectiles, missiles, and fragments recovered from the scene or any person.

(GRANTED) (DENIED)

26. All other physical evidence, property, documents, papers, books, accounts, letters, photographs, objects, tangible things or records which constitute or contain evidence material to any matter involved in this case which are in the possession, custody or control of the state or any of its agencies.

(GRANTED) (DENIED)

27. The location from which each piece of evidence specified in items 19-26 above was found, the time it was found, and the name of the person who found it.

(GRANTED) (DENIED)

28. The written consent to search the defendant's real property, residence, vehicle, effects, papers or person alleged by the state to have been signed prior to the search and seizure of said property.

(GRANTED) (DENIED)

29. The search warrants and affidavits in support thereof obtained by law enforcement authorities to search defendant's real property, residence, vehicle, effects, papers or person in this case.

(GRANTED) (DENIED)

30. The search warrants and affidavits in support thereof obtained by law enforcement authorities to search real property, residence, vehicle, and effects, papers or person of any co-defendants, co-conspirators, parties, accomplices, witnesses or suspects in this case.

(GRANTED) (DENIED)

31. The arrest warrants and capiases, and affidavits in support thereof, obtained by law enforcement authorities to arrest the defendant in this case.

(GRANTED) (DENIED)

32. The arrest warrants and capiases, and affidavits in support thereof, obtained by law enforcement authorities to arrest any co-defendants, co-conspirators, parties, accomplices, witnesses or suspects in this case.

(GRANTED) (DENIED)

33. All recordings and transcriptions of all information and evidence obtained by means of electronic eavesdropping, surveillance, or wiretapping by law enforcement officers, obtained in this case.

(GRANTED) (DENIED)

34. All photographs, videotapes, audiotapes, drawings, charts and diagrams made by the state or law enforcement agency with reference to this case, including, but not limited to those of the scene of the crime and the scene of the defendant's arrest.

(GRANTED) (DENIED)

35. All photographs of the complainant, whether taken at the scene of the alleged offense, at the scene where the complainant was discovered, at the hospital, or at the time the autopsy, if any.

(GRANTED) (DENIED)

36. All photographs of suspects which were shown to all witnesses to the alleged offense, concerning the identity of the perpetrator of the offense for which the defendant has been charged.

(GRANTED) (DENIED)

37. All photographs of the defendant which were used in the investigation of this case, including any photograph which may have been shown by any law enforcement officer to any potential witness in this case.

(GRANTED) (DENIED)

38. All mugshots of the defendant made by the state following his arrest in this case.

(GRANTED) (DENIED)

39. All photographs of all line-ups conducted in this case, including any line-up in which defendant participated.

(GRANTED) (DENIED)

40. All photographs, line-ups, or showups presented to any witness in this case, whether or not defendant was in it, or was identified by the witness.

(GRANTED) (DENIED)

41. The notes generated by law enforcement authorities in connection with these line-ups or show-ups.

(GRANTED) (DENIED)

42. The names and address of any persons who was shown line-ups or photographs showups of any suspects, including the defendant, whether or not defendant was identified.

(GRANTED) (DENIED)

43. All latent fingerprints, palm prints, foot prints, tire tracks or tool marks and reports generated with respect to said prints, discovered by the state which are material to the commission of the crime for which defendant has been charged.

(GRANTED) (DENIED)



44. The results of the comparison of all latent fingerprints, palm prints, foot prints, tire tracks and tool marks with known prints, along with the names of the persons who lifted the latent prints and who performed the comparisons.

(GRANTED) (DENIED)

45. All reports of scientific tests, experiments and comparisons, and the name of each person who made such report or performed such tests, experiments or comparisons, including, but not limited to, reports pertaining to weapons, bullets, shots, waddings, cartridge cases, tool marks, blood, DNA, bodily fluids, breath, hair, threads, drugs, and controlled substances, fingerprints, and medical or psychological examinations.

(GRANTED) (DENIED)

46. All autopsy reports generated in connection with this case.

(GRANTED) (DENIED)

47. All toxicology reports based on an examination of the complainant, the defendant, co-defendants, co-conspirators, parties, accomplices, suspects or any witnesses for the state.

(GRANTED) (DENIED)

48. All notes, reports, memoranda, diagrams, charts, and photographs made or taken by the medical examiner's office, the regional crime laboratory, and its investigators.

(GRANTED) (DENIED)

49. All notes, reports, memoranda, diagrams, charts, photographs, videotapes and audiotapes made or taken by emergency medical technicians who treated the complainant in this case.

(GRANTED) (DENIED)

50. All medical reports which show the physical condition of the complainant at or about the time or after the commission of the alleged offense.

(GRANTED) (DENIED)

51. All medical and psychiatric reports submitted by any doctor, psychiatrist or psychologist at the request of the state or the Court in conjunction with any examination of the defendant, the complainant and all state's witnesses.

(GRANTED) (DENIED)

52. Any evidence in possession of the state that any of its witnesses is presently incompetent to testify, or that any of its witnesses has been found incompetent to testify, incompetent, or insane.

(GRANTED) (DENIED)

53. A list of the names, addresses and professions of all expert witnesses the prosecution intends to call at trial, along with each expert's qualifications, the subject and a description of his or her contemplated testimony, and his or her report.

(GRANTED) (DENIED)

54. Any expert witnesses or expert witness reports or data known or believed by the state to contain evidence which tends to exculpate defendant or mitigate defendant's punishment in this case.

(GRANTED) (DENIED)

55. Any evidence as to the incompetency of the defendant to stand trial which is in the possession of, or within the knowledge of, the state or its agents.

(GRANTED) (DENIED)

56. Any evidence as to the insanity of the defendant at the time of the alleged commission of the offense charged herein, which is in the possession of, or within the knowledge of, the state or its agents.

(GRANTED) (DENIED)

57. Any evidence in the possession of the state or its agents or within their knowledge that defendant has ever been adjudicated or declared insane or incompetent to stand trial.

(GRANTED) (DENIED)

58. The criminal record of each witness for the state showing every conviction or probation for felony or misdemeanor involving moral turpitude which is admissible for impeachment under Rule 609 of the Texas Rules of Criminal Evidence.

(GRANTED) (DENIED)

59. The criminal record of each witness for the state showing every event which can be

used to impeach the witness including any deferred adjudication probations, arrests, or juvenile adjudications pending against the witness between the time of the offense alleged against defendant and defendant's trial.

(GRANTED) (DENIED)

60. Evidence of a pertinent trait of character of the alleged victim of the crime with which defendant is charged, admissible under Rule 404(a)(2) of the Texas Rules of Criminal Evidence.

(GRANTED) (DENIED)

61. All information regarding defendant which was obtained by the police in this case through the so-called "Crime Stoppers Programs."

(GRANTED) (DENIED)

62. All recorded incoming telephone calls to "911" or the sheriff's office or the police station requesting assistance at the time this incident was reported.

(GRANTED) (DENIED)

63. All recorded communications between the dispatcher and law enforcement agents who were called to the scene in this case.

(GRANTED) (DENIED)

64. The name, address, and telephone numbers of each informer who participated in this alleged offense, in defendant's arrest, or who is a material witness to this alleged offense.

(GRANTED) (DENIED)

65. The name, address and telephone numbers of each informer whose testimony is necessary to a fair determination of guilt or innocence in this case, as required by Rule 508(c)(2) of the Texas Rules of Criminal Evidence.

(GRANTED) (DENIED)

66. The name, address and telephone numbers of each informer relied upon by law enforcement to establish the legality of the means by which evidence was obtained in this case.

(GRANTED) (DENIED)

67. All victim impact statements which contain material which exculpates defendant or mitigates punishment, as required by article 56.03(g) of the Texas Code of Criminal Procedure.

(GRANTED) (DENIED)

68. All inducements offered by the state which might tend to motivate its witnesses to testify against defendant, including, but not limited to, plea bargain agreements, fee, expense, or reward arrangements, agreements to dismiss or reduce or not bring charges, or any other agreement of leniency.

(GRANTED) (DENIED)

69. All evidence in possession of, or within the knowledge of, the state or any of its agencies, including impeachment evidence,

which is favorable to defendant and material either to guilt or to punishment.

(GRANTED) (DENIED)

II.

In support of this motion, defendant shows the following:

1. The items requested are in the exclusive possession, custody and control of the State of Texas or the United States Government by and through its agents, the police or the prosecuting attorney's office, and the defendant has no other means of ascertaining the disclosures requested.
2. The items requested are not privileged.
3. The items and information are material to this cause and the issues of guilt or innocence and punishment to be determined in this cause.
4. The defendant cannot safely go to trial without such information and inspection, nor can the defendant adequately prepare the defense to the charges against him.
5. The defendant's rights will be violated under Article 39.14 of the Texas Code of Criminal Procedure, Article I, §§ 3, 3a, 10, 13 and 19 of the Constitution of the State of Texas, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America by such absent discovery.

WHEREFORE, PREMISES CONSIDERED, defendant respectfully prays that this Honorable Court



will grant this Motion for Discovery in all things, or in the alternative, that this Court will set this matter down for a hearing prior to trial on the merits and that at such hearing this Motion will be in all things granted.

Respectfully submitted,

Mario A. Trevino  
315 S. Main  
San Antonio, Texas 78204  
2260026

BY: /s/ Mario A. Trevino  
MARIO A. TREVINO

STATE BAR NO.: 20211250

ATTORNEY FOR DEFENDANT

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing Motion for Discovery was delivered to the District Attorney's Office, at BEXAR COUNTY JUSTICE CENTER, SAN ANTONIO, TEXAS 78205, on 5-15, 1997.

Mario A. Trevino  
315 S. Main  
San Antonio, Texas 78204  
2260026

BY: /s/ Mario A. Trevino  
MARIO A. TREVINO

STATE BAR NO.: 20211250

ATTORNEY FOR DEFENDANT

**ORDER**

On \_\_\_\_\_, 1997, came on to be heard defendant's Motion For Discovery, and after hearing same, the Court orders discovery as indicated in the body of the motion.

/s/ \_\_\_\_\_  
PRESIDING JUDGE

NO. 96-CR-4111B

[handwritten correction: 97CR1717D]

|                          |   |                            |
|--------------------------|---|----------------------------|
| STATE OF TEXAS           | § | IN THE DISTRICT<br>COURT   |
| vs.                      | § | 290TH JUDICIAL<br>DISTRICT |
| ROBERT CARLOS<br>TREVINO | § | BEXAR COUNTY,<br>TEXAS     |

**MOTION FOR DISCOVERY OF EXCULPATORY  
AND MITIGATING EVIDENCE**

**TO THE HONORABLE JUDGE OF SAID COURT:**

Now comes the defendant, Robert Carlos Trevino, by and through undersigned counsel, and respectfully moves this Court to order the state to disclose all evidence in its possession and in the possession of its agents, which is both favorable to the defendant and material either to guilt or to punishment, including impeachment evidence.

I.

Such disclosure is required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also United States v. Bagley*, 473 U.S. 667, 675-78 (1985). Disclosure is also required under the Due Course of Law provisions of Article I, §§ 13 and 19 of the Texas Constitution.

II.

Rule 309(d) of the Texas Disciplinary Rules of Professional Conduct requires prosecutors to "make timely disclosure to the defense of all evidence or information

known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, to disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal".

WHEREFORE, PREMISES CONSIDERED, defendant prays that this Court order the state to disclose all exculpatory and mitigating evidence in its possession.

Respectfully submitted,

Mario A. Trevino  
315 S. Main  
San Antonio, Texas 78204  
2260026

BY: /s/ Mario A. Trevino  
MARIO A. TREVINO

STATE BAR NO.: 20211250

ATTORNEY FOR DEFENDANT

### CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion for Discovery of Exculpatory and Mitigating Evidence was delivered to the District Attorney's Office, at BEXAR COUNTY JUSTICE CENTER, SAN ANTONIO, TEXAS 78205, on 5-15, 1997.

Mario A. Trevino  
315 S. Main  
San Antonio, Texas 78204  
2260026

BY: /s/ Mario A. Trevino  
MARIO A. TREVINO

STATE BAR NO.: 20211250

ATTORNEY FOR DEFENDANT

**ORDER**

On May 22, 1997, came on to be considered defendant's Motion for Discovery Of Exculpatory And Mitigating Evidence, and said Motion is hereby

(GRANTED)

~~(DENIED)~~.

/s/ Sharon MacRae  
PRESIDING JUDGE

**PRETRIAL MOTIONS HEARING  
JUNE 18, 1997**

\* \* \*

[32] knows what will happen. And we have had alternates who have to be seated. So even though you are the alternate, please pay close attention to the evidence as it comes out. We're going to be starting in the morning at 9:00 o'clock. So I will ask you to be back then. And if you will, you've been to the Central—I mean, to our jury room already. Right?

JUROR: Right.

THE COURT: If you will, just come back there at 9:00 o'clock, and we'll get underway. Thank you very much.

JUROR: Thank you.

THE COURT: I understand y'all have an additional motion or two for the Court to look over?

MR. TREVINO: Yes, Judge. I think we've already covered the motion for appointment of an expert which the Court has granted. Is that correct?

THE COURT: I don't know if we did any of this on the record. Did we?

MR. TREVINO: No.

THE COURT: Well, I think we should so that it will be reflected what has happened in the meantime. Since we picked our last juror, the [33] State has said what?

MR. TREVINO: The State has tendered me a copy of the forensic science laboratory report



that reflects that blood evidence or DNA evidence has been conducted on my client and the deceased, and that they cannot exclude my client as being one of the donors of that blood.

THE COURT: All right.

MR. TREVINO: As the Court would note, we had several pretrial motions and at the time I specifically asked whether there was any type of forensic or DNA testing, and I was told no. I think I was clearly on the record. The Friday before we started jury selection, I was informed by the prosecutor that a test had not been conducted on certain clothing of the defendant. And that—

[34]

THE COURT: The defendant?

MR. TREVINO: I'm sorry, of the victim, and that it had been an oversight by the investigators. And she wanted to make me aware that that was there and that it was going to be submitted to the lab for testing. We talked a bit and weren't certain what the results would be. Since all the other results have been negative, we basically let it go.

THE COURT: And now the result is what?

MR. TREVINO: The result is now that they have not been able to exclude my client as being the donor of blood that was found on the clothing belonging to the deceased.

THE COURT: All right.

MR. TREVINO: Throughout the voir dire, we had various conversations with the prose-

cution regarding this matter. And there was never any—I mean, everything that was done was proven to be negative. At the conclusion that's when I was told that it was—that the results had now come in.

THE COURT: And that's today?

MR. TREVINO: I was actually told yesterday at about—I think it would be in the afternoon?

MS. HERR: After lunch.

MR. TREVINO: After lunch is when I was told. It's a surprise to me that the results are now in and I think it's a surprise to the State, too. But, nevertheless, the results are there. As the Court knows, we did not voir dire for any type of scientific evidence.

[35]

THE COURT: Well, I don't think it's appropriate to do so anyway.

MR. TREVINO: Well, I talked to my client whether I should urge a motion for a mistrial. And he says he would like me to urge a motion for a mistrial. So at this time, I am urging that motion. And as proof thereof, I would show that we have not conducted any type of voir dire on the scientific principle and what effect it may have on the jurors.

I would certainly, secondly, point out to the Court that a juror, Mr. Bargainer, has been to medical school. He is No. 62. It's actually Juror No. 8. He has some experience in medicine. He has some knowledge in medicine. Because we were unaware of this information, it is our position that we could not intelligently advise our client and exer-

cise our peremptory strikes. We're urging a mistrial.

THE COURT: Denied.

MR. TREVINO: Okay.

THE COURT: Now, have you found an expert to examine this evidence?

MR. WILCOX: May I address the Court on that behalf, Your Honor?

[36]

THE COURT: Yes.

MR. WILCOX: Since we were made aware of this new evidence, I have made contact with a number of individuals and companies; one being the Analytical Center for Genetic Testing out of Denver, Colorado. They indicate to me that if they could have the samples by tomorrow, that it would be a minimum of three weeks turnaround before they could have the results that we would need to examine and analyze in preparation for defense for the evidence, if it's there.

In addition to that, I contacted a company out of Dallas, Texas, which is Gene Screen, and I am presently still in contact with the individuals there. They indicate to me that there would be a five day turnaround if they perform certain tests which they have suggested in this matter. And they've given us the expenses and—that would be involved. And it's just a matter then of getting the samples that the State already has in their custody and preserve the integrity of those samples and getting them to the Dallas lab. It's a five day turnaround.

THE COURT: That certainly sounds better than three weeks.

[37]

MR. WILCOX: Yes, it does.

THE COURT: So I'll certainly appoint them. Gene Screen?

MR. WILCOX: It's Gene Screen.

THE COURT: And how much is this going to cost?

MR. WILCOX: They indicate to me initially that it's about 675 per sample or per test on the sample. They've indicated—I have faxed them what the State has tendered to me. They are going to look at it and get back with me. I can't give you the ultimate figure on that. As soon as I get that, I'll relay it to the Court. But right now they've indicated \$675. That's about \$1400 rounded off.

THE COURT: All right.

MR. WILCOX: But it may be more. I don't know. I don't know in testimony that may come from there, travel time and fees and things like that. But yes, it does sound a lot better than three weeks to eight weeks turnaround.

THE COURT: All right. Well, I'll put Gene Screen in here.

MR. WILCOX: In fact, formally that's called Gene Screen Forensic Serology Testing, [38] and they are located in Dallas, Texas.

THE COURT: Now, I'm assuming that you will talk to them further this evening?

MR. WILCOX: Yes. I'm in contact with the lady in charge of that. Her name is Judy Floyd.

THE COURT: Is she the name that I should put in here or I can wait to put in the name and put in the amount?

MR. WILCOX: Yes, ma'am.

THE COURT: But you will have your expert and you may tell her that I will sign the order and have them paid for their work. They can submit me a bill. I just need to get an idea of what it is. Now, I want to be sure after you talk to her that whatever tests that they are able to do in five days will be adequate to meet whatever it is that the State is going to offer.

MR. WILCOX: The indication that I have at this point in time is that it will be.

THE COURT: All right. If it's not, you can tell me in the morning and then we'll talk about what to do with the Jury.

MR. WILCOX: Okay. In fact, if I know before then if you are still here, I'll let you [39] know before then.

THE COURT: Okay. Fair enough. Anything else?

MR. TREVINO: One last thing, Judge. I guess we're going to get started tomorrow morning. Opening statements is one of my concerns since DNA evidence is still in question at this time. I was wondering if the Court might consider not—ordering that no mention of DNA be in either party's opening statement.

THE COURT: Well, if you—No. They can mention theirs and if you want to reserve yours until after your expert has had a chance to do your test and if they have some evidence that is going to be helpful to you, then you can mention it in your opening statement at the opening of your case. I thought DNA testing took at least a month to do.

MR. SHAEFFER: Depends on the type.

MS. HERR: The one we did is PCR and that took two weeks. They have a new one that can be done even quicker.

THE COURT: So your expert is in the same ballpark with theirs as far as the testing [40] goes. Correct?

MR. WILCOX: It would seem to be so, Judge. The number of tests that I've seen and had dialogue with out of the Colorado laboratory indicates that there are tests that would take a minimum of three years. That is confirmed also by the lab in Dallas. But there's been suggestions as to alternative tests that may or may not be—or they indicate to us as valid that do not consume three weeks to eight weeks.

THE COURT: All right then. I'll see y'all in the morning.

(WHEREUPON, the proceedings  
(were here recessed for the day.)



**TRIAL TESTIMONY OF KAREN LANNING  
JUNE 20, 1997**

\* \* \*

[142]

- A From known samples I compared items from the scene and also from the victim to his known samples, which would have been his pants and a pair of shorts.

COURT REPORTER: I'm sorry, there's a word you are saying—are you saying seat? From the seat?

WITNESS: The scene.

COURT REPORTER: The scene. Thank you.

**BY MS. HERR:**

- Q All right. Now, you've given us an overall description of how that fiber collection works, collecting debris. Is that how it was done with the pants and the shorts in this case?
- A Yes.
- Q And then also with the panties that were collected at the scene. Is that correct?
- A Yes, it is.
- Q All right. What color panties are we talking about?
- A They were a pair of white panties.
- Q Now, can you tell us what the results of those comparisons were?
- A Well, I found polyester and cotton fibers on the panties that are consistent with coming from the pants identified as coming from Mr. Trevino and

also [143] polyester fibers on the victim's shorts that are consistent with the polyester fibers identified as coming from Mr. Trevino's pants.

MS. HERR: May I approach the witness, Your Honor?

THE COURT: Uh-huh.

BY MS. HERR:

Q We had a chance to review—look over some of this evidence before you got on the stand today. Is that correct?

A Yes, I did.

Q All right. I'm going to hand you what's been marked as State's Exhibit No. 45, and ask if you can identify this for me, please.

A Yes, I can. This is what's been—This is what's been identified to me as a pair of panties from the victim.

Q All right. And when that—when this item was received at your lab, was there any marking done to its container?

A Yes, it was.

Q All right. What markings do you see that you recognize on this envelope?

A The FBI laboratory number, the item number and initials.

\* \* \*

[168] a cutting. And you get like a tweezer to pull a fiber out of the cutting. Is that correct?

A Yes. Under the stereo microscope, the fibers—fibers are fabrics made up of yarn. And those

yarns will be diagonally and also vertical. I take fibers from both of those directions and then tweeze them out so I can get the individual fibers to know what the fiber makeup is.

Q And the reason for going through those steps and getting the fibers, can you explain that?

A Yeah. Sometimes the yarns may be made up of a mixture of the fibers. In this case they could be polyester and fiber blended together to form one yarn or it could be that there's polyester fibers run one direction and cotton run another direction. So we take both so that we will have a good representative sample.

Q Now, you described earlier that you and your technician would have been the only ones that were handling this evidence. Is that correct?

A That's correct.

Q And you know that because the box came to you and it was sealed. No one had opened it there from the FBI?

A That's correct.

Q Now, you have already identified the panties that [169] belonged to the victim in this case, Linda Salinas. And you made a—there was match then to Carlos Trevino's pants. Can you tell us, please, the names of the other suspects that you got known samples from that you were asked to do comparisons for?

A Yes. They were, and I'm not sure if I'm pronouncing these correctly, Sienido Rey, Juan Gonzales, Brian Apolinar and Santos Cervantes.

- Q Thank you. Now, can you tell us what the procedure is, please, when all the testing is completed as far as getting it ready to send it back?
- A Yes. After all of the examinations are completed, a re-inventory is done of the items to make sure everything is present. They are sealed up, placed in a box and then certified mail or—I'm sorry, registered mail back to the contributor.
- Q And are they—I notice that they—as we show them to you today, they are in the same bag that they were in when they were sent to you. Is that correct?
- A That's correct.
- Q Okay. Thank you.

THE COURT: All right. If you have a lot more questions, we're going to take a break.

MR. WILCOX: I just have one or

\* \* \*

**TRIAL TESTIMONY OF JUAN GONZALES  
JUNE 23, 1997**

[166]

**DIRECT EXAMINATION**

**BY MS. HERR:**

**Q** Would you state your full name for the Jury, please?

**A** Juan Benito Gonzales.

**Q** How old are you, Juan?

**A** Fifteen.

**THE COURT:** Did I swear you in, Juan?

**WITNESS:** No, ma'am.

**JUAN GONZALES,**

the witness, after first being duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, testified upon oath as follows:

**THE COURT:** One of the rules that we have here is that you shouldn't discuss any of the testimony you give here in court with any of the other witnesses. You may talk with the lawyers about your testimony. Just do not do it in front of other witnesses who will be testifying. Okay?

**WITNESS:** Yes, ma'am.

**THE COURT:** All right.

**BY MS. HERR:**

**Q** Juan, do you know a person by the name of Carlos Trevino?

**A** Yes, ma'am.

[167]

Q Is he related to you?

A Yes, ma'am.

Q And how is he related to you?

A He's my cousin.

Q All right. Do you know a person by the name of Santos Cervantes?

A Yes, ma'am.

Q And how long have you known him?

A For about three or four weeks.

Q And when you say you've known him three or four weeks, are you talking about three or four weeks before the time of the murder?

A Yes, ma'am.

Q All right. And do you know a person by the name of Sienido Rey?

A Yes, ma'am.

Q And at the time of the murder how long had you known him?

A Two days.

Q And do you know a person by the name of Brian Apolinar?

A Yes, ma'am.

Q And at the time of the murder, how long had you known him?

A Three or four weeks.



[168]

Q All right. Back around June 10th of 1996, where did you live?

A I was spending the night at my aunt's house on XXXX.

COURT REPORTER: Hang on just a minute.

THE COURT: You're going to have to speak up. And perhaps—I don't know. If you can get closer to the microphone, that would be good or raise the microphone up. But these people need to hear you and they're not hearing you.

COURT REPORTER: You need to repeat your answer. Are you staying or are you spending?

WITNESS: I was spending the night at my aunt's house at XXXX.

BY MS. HERR:

Q All right. What is your aunt's name?

A Juanita DeLeon.

Q And on that same night was Carlos Trevino staying at the same place?

A Yes, ma'am.

Q All right. And how long had he been staying there at your aunt's house?

A For about three weeks.

[169]

Q Now, were you just there for that night or were you living with your aunt, also?

A I was just there for that night.

Q All right. Because usually who did you stay with?

A My mom.

Q And what's her name?

A Irene DeLeon.

Q All right. And where did your mother live?

A In XXXX.

Q In a trailer?

A Yes, ma'am.

Q All right. All right. Juan, I would like to go ahead and turn your attention back to the evening of June the 9th of 1996. Can you tell the Jury what you were doing that evening?

A I was at my aunt's house.

Q Who else was there with you?

A My cousin Carlos, my aunt, my grandpa, my two little cousins.

Q All right. And at some point that evening, did you leave your aunt's house?

A Yes, ma'am.

Q For what? What were you going to go do?

A I was going to go to Jay's house.

[170]

Q Do you know Jay's last name?

A Mata.

Q All right. Where did Jay live?

A On Mary Street.

Q Was that anywhere close to you?

A About six or seven blocks away.

Q Were you going to walk over there?

A No, ma'am.

Q How were you going to get there?

A Santos and Brian.

Q How did you connect up with Santos and Brian that night?

A They came over to the house.

Q Did you know they were coming over?

A No, ma'am.

Q They just popped in?

A Uh-huh.

Q About what time did that happen?

A I don't remember.

Q All right. Now you say you had only known Santos at that point for about three weeks?

A Three or four weeks, yes, ma'am.

Q And you had only known Brian for that same length of time. Right?

A Yes, ma'am.

[171]

Q But they did already know where you lived?

A Yes, ma'am.

Q When they got to your house, what happened next?

A Me and my cousin Carlos left with them to Jay's house.

Q All right. And when you say to Jay's house, once again you are talking about the location on Mary Street?

A Yes, ma'am.

Q So was it you and Carlos and Santos and Brian heading over?

A And Sam.

Q And Sam. Now when did you connect up with Sam?

A A day ago from that day.

Q So, had Sam been at your house a day earlier?

A Yes.

Q Had he stayed there?

A I don't remember.

Q All right. And do you mean at your mom's house or do you mean at XXXX?

A XXXX.

Q Do you know whether or not he had spent the night at your aunt's house?

A I don't remember.

Q You don't remember. All right. Do you remember [172] whether or not Sam was already at that address when you got there on the 9th?

A Yes, I do.

Q All right. So he was already there?

A Yes.

Q With Carlos?

A Yes.

Q All right. And then you got there?

A Yes.

Q All right. So when you say we then went to Jay's house, who all went with you to Jay Mata's house?

A Me, Brian, Santos, Carlos, and Sam.

Q The five of you then. Right?

A Yes, ma'am.

Q All right. And what car were you in?

A Brian's car.

Q All right. And had you seen Brian's car before?

A Yes, ma'am.

Q All right. I'm going to show you State's Exhibit No. 5 and No. 6. Do you recognize these pictures?

A Yes, ma'am.

Q What are they a picture of?

A Brian's car.

Q Is that the one that you were in June 9th of 1996?

[173]

A Yes, ma'am.

Q Okay. How old is Carlos? Do you know?

A About 22 or 21.

Q All right. What do you do when you get to Jay's house?

A Kick back.

Q All right. And do you recall what time it was when you got to Jay's house?

A No, ma'am.

Q Was it nighttime?

A Yes, ma'am.

Q Was it after dark?

A It was like barely getting dark.

Q All right. And when you say "kick back," what does that mean?

A Just talk to them and—

Q Drinking?

A Yes, ma'am.

Q What was everybody drinking that night?

A Beer.

Q All right. Once you get there, how long do you stay at Jay's house?

A For about an hour-and-a-half.

Q All right. And then what happens?

A And then we go to the store.

Q And what store do you go to?

[174]

A The Pik-Nik on Division and South Flores.

Q And how many of you go?

A The five of us.

Q Which five by name, please?

A Brian, Santos, Sam, me, and Carlos.



Q All right. And are you in the same car?

A Yes, ma'am.

Q In Brian's car?

A Yes, ma'am.

Q And who is driving?

A Brian.

Q Okay. And who sits in the front?

A Santos.

Q And who is in the back?

A Carlos and me.

Q Carlos, you, and Sam?

A Yes, ma'am.

Q All right. Do you remember what you were wearing that night?

A A black shirt with some black shorts.

Q Do you remember what Carlos was wearing?

A No, ma'am.

Q Do you remember what Sam was wearing? Sienido?

A No, ma'am.

Q What about Brian?

[175]

A No, ma'am.

Q Or Santos? Do you remember what he was wearing?

A No.

Q So, when you get to the Pik-Nik—Well, first of all, why are you going there?

A To get some more beer and put gas in the car.

Q All right. And was the Pik-Nik close to the house on Mary Street?

A It was two blocks away.

Q Two blocks away. And is it already dark now when you get to the Pik-Nik?

A Yes, ma'am.

Q So, once the car pulls into the Pik-Nik, where do you go?

A Inside the store.

Q And what do you go inside the store for?

A To buy some chips.

Q Does anyone else go inside the store?

A Sam.

Q All right. And what's he going in the store for?

A Beer.

Q All right. What does Brian do?

A He waits by the car.

Q And what does Santos do?

A He was walking towards the pay phone as I was going [176] into the store.

Q All right. And what does Carlos do?

A Wait right there by Brian.

Q What was Brian doing while he was by the car?

A He was putting gas in the car.

Q And Carlos was just out by the car waiting?

A Talking to him.

Q And you said that Santos went over to the pay phone. Right?

A Yes, ma'am.

Q All right. And was—What did he do when he got to the pay phone?

A I was inside the store. I couldn't see him.

Q Was he talking to any—When you came back out, did you see him?

A Yes, ma'am.

Q All right. What was he doing then?

A He was talking to a girl.

Q All right. Did you notice the girl there before when you walked into the store?

A Yes, ma'am.

Q What was she doing?

A She was on the phone.

Q Was she a young girl?

A I don't know.

[177]

Q All right. After you got your chips, where did you go?

A Back to the car.

Q And after Sienido got his beer, where did he go?

A Back to the car.

Q And what happens next?

A And then Santos comes to Brian and asks Brian if he could give the girl a ride to Whataburger on Steve. And Brian says yes.

Q All right. So, does everyone get back in the car?

A Yes, ma'am.

Q All right. And is Brian still the driver?

A Yes, ma'am.

Q And is Santos still in the front seat?

A Yes, ma'am.

Q And the rest of you are in the back seat?

A Yes, ma'am.

Q And where does the girl sit?

A On Santos's lap.

Q Now, what kind of seats are in the front of that car? Is there a console in the middle?

A Two single seats.

Q All right. And, so, she's sitting over on the side that Santos is sitting on. Is that correct?

[178]

A Yes, ma'am.

Q And in the back seat, where are you?

A In the middle.

Q And, so, are you able to see Linda from where you are?

A Yes, ma'am.

Q All right. I'm going to show you State's Exhibit No. 4, and ask you if you recognize this picture.

A Yes, ma'am.

Q Is that a picture of the girl that was picked up that night at the Pik-Nik?

A Yes, ma'am.

Q All right. So as far as you knew, where was everybody going to take Linda?

A To the Whataburger on Steve Street.

Q In fact, did someone have directions on how to get to it?

MR. TREVINO: Judge, I'm going to object. She's leading the witness.

THE COURT: Sustained.

BY MS. HERR:

Q All right. So, once she's in the car, what happens next?

A We started going out Flores towards—towards Theo and Malone.

Q And then?

[179]

A Then we turn on some street.

Q And then?

A And then as we were down the street, we stop at Mission Road, I think.

Q Stopped at Mission Road?

A And then we took a right.

Q Is this the way to the Whataburger?

A No, ma'am.

- Q Do you know why the car was not headed towards the Whataburger?
- A No, ma'am.
- Q When Linda got in the car with all of you, was she smiling?
- A Yes, ma'am.
- Q She seemed happy?
- A Yes, ma'am.
- Q Does something happen to an article of her clothing?
- A Yes, ma'am.
- Q What happens?
- A Santos takes off her bra.
- Q What does he do with it?
- A He throws it at Brian.
- Q What does Brian do?
- A Throws it back at him.
- Q Do you notice a change in Linda's expression as the [180] evening wears on?
- A Yes, ma'am.
- Q What changes?
- A Well, when she first got in the car she had a big smile on her face. But when that happened, she had like a little smile.
- Q Now, once you noticed that the car was not headed towards the Whataburger, did you know where everyone was headed?



A No, ma'am.

Q All right. How long did the drive with Linda in the car last?

A About five minutes or less.

Q All right. And then did Brian park the car somewhere?

A Yes, ma'am.

Q And where did he park the car?

A In Espada Park, in the parking lot.

Q How are you feeling right about now when you see where the car has gone?

A Kind of worried.

Q And what are you worried about?

A About what's going to happen.

Q Do you have any idea what's going to happen?

A No, ma'am.

[181]

Q All right. Now once the car—You said it parked at Espada Park?

A Yes, ma'am.

Q And when the car stops, what happens next?

A Santos take the girl into the woods.

Q Now, does the car park in kind of a—is it a parking area there in the park?

A Yes, ma'am.

Q Have you had a chance to look at these pictures before in our office before you testified today?

A Yes, ma'am.

Q All right. Did you see a picture that had a pretty good view of where the car was parked?

A Yes, ma'am.

Q Could you point to that picture for me, please?

A That one (indicating).

Q All right. You are pointing to State's Exhibit No. 8. Is that correct?

A Yes, ma'am.

Q All right. And on State's Exhibit No. 8, if you will just step down right here and point to where the car was parked.

A Here (indicating).

Q Right there. All right. All right. Once the car parks there, who gets out of the car first?

[182]

A Santos and the girl.

Q And where do they go?

A Behind the bushes.

Q All right. And what happens next?

A And then that's when Brian goes down.

Q How long would you say that they were over in the bushes before Brian goes over there?

A About two minutes, three.

Q And then Brian goes over to join them?

A Yes, ma'am.

Q And then how long is Brian gone before you go over there?

A About three minutes.

Q Now when you go over there, does anyone go with you?

A Yes, ma'am.

Q Who goes with you?

A Carlos and Sam.

Q All right. When you go around to where they are, what is the first thing that you see?

A Santos on top of her and Brian holding her hands down.

Q All right. And when you say that Santos is on top of her, is she lying on her back?

A Yes, ma'am.

Q All right. And what is Santos doing to her?

[183]

A Having intercourse with her.

Q All right. And what is Brian doing?

A Holding her down.

Q And holding her down, what's he holding on to? What part of her body?

A Her wrists.

Q Where are her wrists? Are they down by the side of her or over the top of her head?

A Over the top of her head.

Q Is she making any sounds?

A She's struggling to get away.

Q What clothes does she have on?

A I don't remember.

Q All right. Now, she's struggling to get away and that's what you first see when you walk over there. Is that correct?

A Yes, ma'am.

Q What happens next?

A And then Santos gets off and then Sam gets on top.

Q Is Brian still holding her down?

A Yes, ma'am.

Q And now Sam is on top of her?

A Yes, ma'am.

Q And what does Sam do to her?

A He has intercourse with her.

[184]

Q How long does he have intercourse with her?

A I don't remember.

Q Do you have an idea of whether it was over five minutes or less than five minutes?

A Like less than five minutes.

Q All right. And with regard to seeing Santos having intercourse with her, is it over five minutes or less than five minutes?

A Less than five minutes.

Q Okay. After Sam has intercourse with her, are you still standing at the same place that you were before?

A Yes, ma'am.

Q All right. What happens after Sam has intercourse with her?

A They turn her around.

Q And you say they turn her around, who turns her around?

A Santos and Brian.

Q Santos and Brian? How do they turn her around?

A Santos tells her to turn around and if not, he's going to hit her.

Q So Santos says, "Turn around or I'm going to hit you"?

A Yes, ma'am.

[185]

Q Is she able to turn around by herself?

A Yes, ma'am.

Q Do they have to—Are they touching her and making her turn around?

MR. TREVINO: Judge, I'm going to object to the leading nature of her questions and suggestive nature.

THE COURT: Sustained.

BY MS. HERR:

Q So she turns over?

A Yes, ma'am.

Q What happens next?

A And then my cousin tells me it's my turn and I tell him no, and I went back up to the car.

Q Now, you testified then that they turned her over. Is that correct?

A Yes, ma'am.

Q Is there any other sexual activity that you see after they turned her over?

A I don't remember.

Q All right. Would it help you to review the statement, your written statement, to refresh your testimony?

A No, ma'am.

Q Would you like to try it or read over that portion of [186] your statement to see if that refreshes your memory?

A Yes, ma'am.

Q All right. Go ahead and take a few minutes.

A (Witness complies.)

Q Have you had a chance to read that paragraph?

A Yes, ma'am.

Q Now, you've already described to the Jury when Santos and Brian told her to turn over.

A Yes, ma'am.

Q What happened next?

A Santos got behind her and put his penis in her butt.

Q What did Brian do?



A He got in front of her and put his penis in her mouth.

Q What do you remember about Linda?

A And—

Q How was she when that was happening?

A She was trying to struggle, but Sam was holding her down.

Q What was Carlos doing?

A Standing there with me.

Q And what happens next?

A And then Brian gets out of the way and Sam does the same thing that Brian did.

Q And by that, you mean he puts his penis in her mouth?

[187]

A Yes, ma'am.

Q And how long does that last?

A Less than five minutes.

Q And with Brian having his penis in her mouth, how long did that last?

A Less than five minutes.

Q When Santos was raping her from behind, how long did that last?

A About five minutes.

Q And after Sam has his penis in her mouth, what happens next?

A Would you repeat your question?

Q Yes. What else happened while she was turned over like that?

A Nothing. I went back to the car.

Q What did Carlos do before you went back to the car?

A Nothing.

Q Do you see Carlos present here in the courtroom today?

A Yes, ma'am.

Q Can you describe what he's wearing?

A Black jacket, like a black suit jacket, black and brown and gold tie, like a little blue shirt.

Q All right. And he's sitting at the end of the counsel table. Is that correct?

[188]

A Yes, ma'am.

MS. HERR: May the record reflect this witness has identified the defendant?

THE COURT: Yes.

BY MS. HERR:

Q All right. You went back—You said you went back to the car. Is that what you just said?

A Yes, ma'am.

Q All right. You have described what Santos and Brian and Sam did. What did Carlos do with regard to the sexual activities?

A I didn't see nothing.

Q Now after you went up to the car, how long did you stay there at the car?

A About two to four minutes.

Q All right. Did anyone go back up to the car with you?

A Sam did, but he got a drink of beer and went back down.

Q All right. And do you go back down?

A Yes, ma'am.

Q All right. How long do you stay up at the car?

A About two to four minutes.

Q Then you go back down?

A Yes, ma'am.

[189]

Q Do you go back to the same place you were at before?

A Yes, ma'am.

Q Is that the place there at the top of the hill?

A Yes, ma'am.

Q But in the bushes. Right?

A Yes, ma'am.

Q All right. What do you see when you go back the second time?

A They weren't at the top of the hill.

COURT REPORTER: They were or weren't?

WITNESS: They weren't.

BY MS. HERR:

Q And where were they?

A At the bottom by the creek.

Q And who did you see down at the bottom of the creek?

A Carlos, Santos, Sam, and Brian.

Q And where was Linda?

A Laying on the floor.

Q Was she on the ground then down there close to the creek?

A Yes, ma'am.

Q Was she moving?

A No, ma'am.

Q Was she crying?

[190]

A No, ma'am.

Q Could you hear any noise coming from her?

A No, ma'am.

Q And what were Carlos, Santos, Sam, and Brian doing?

A Just standing over her.

Q And where were you standing when you saw them?

A When you go down the hill, there's two rocks. I was right there.

Q Okay. Would you say that again a little louder and a little slower.

A Where you go down to the—by the creek, there was two rocks and I was standing right there where the two rocks are at.

Q All right. So, you went down the pathway. There was a pathway there. Right?

A Yes, ma'am.

Q And were you standing half-way down?

A Yes, ma'am.

Q And when you see them down there, do you see anymore sexual activity going on?

A No, ma'am.

Q Do you hear any conversation between them?

A Yes, ma'am.

Q All right. What do you hear?

A Sam told Santos, "We don't need no witnesses."

[191]

Q Sam told Santos "we don't need no witnesses"?

A Yes, ma'am.

Q What else do you hear?

A Santos told my cousin Carlos.

Q He tells him the same thing?

A Yes, ma'am.

Q "We don't need no witnesses"?

A Yes, ma'am.

Q And then what else do you hear?

A My cousin Carlos said, "We'll do what we have to do."

Q "We'll do what we have to do." Is that right?

A Yes, ma'am.

Q All right. What happens—All right. After you hear those statements back and forth, how many of them are standing down there when those statements are made?

A Four of them.

Q All four of them?

A Yes, ma'am.

Q After that statement is made, what do you do?

A I go back to the car.

Q And what happens next? Are you there by yourself at the car?

A Yes, ma'am.

Q And how are you feeling when you are back there at [192] the car?

A Scared.

Q Why are you scared?

A Because I don't know what they did to her because I couldn't hear her cry or nothing.

Q All right. And while you were at the car there, then what happens next?

A In about five minutes, they all come up.

Q And when they come up, do you notice anything unusual about the way they look?

A No, ma'am.

Q Do you see any blood on any of them?



MR. TREVINO: Judge, objection. That's leading.

THE COURT: Overruled.

BY MS. HERR:

Q You can answer it.

A Yes, ma'am.

Q Who has blood on them?

A Santos and Carlos.

Q All right. Do you see any weapons?

A No, ma'am.

Q Now when they get back up to the car, what happens next?

A Brian gets in the passenger side and Sam gets in the [193] driver side and we leave.

Q All right. Now before we go into that part of it, you said earlier something about Carlos trying to get you to have sex with Linda, too. Is that right?

A Yes, ma'am.

Q And where were they when that happened?

A At the top of the hill.

Q Okay. And did you yourself have sex with Linda?

A No, ma'am.

Q And why not?

A Because I knew it was wrong.

Q And Linda had not consented to sex with any of these people. Right?

MR. TREVINO: Judge, objection. I don't see how he could know that.

MS. HERR: I'll rephrase it, Your Honor.

THE COURT: All right.

BY MS. HERR:

Q You saw Linda when this was going on. Right?

A Yes, ma'am.

Q She was struggling?

A Yes, ma'am.

Q All right. She was being held down?

[194]

A Yes, ma'am.

Q All right. Did you see Carlos holding her down for part of it?

A No, ma'am.

COURT REPORTER: No? No?

WITNESS: No.

BY MS. HERR:

Q Do you still have a copy of your statement in front of you there?

A Yes, ma'am.

Q All right. If you will just read this paragraph here to refresh your memory.

MR. TREVINO: Judge, I'm going to object to this. There's nothing that shows his memory needs refreshing. He said he didn't see it.

THE COURT: Well, that's true. What's your question now?

MS. HERR: Whether he saw Carlos holding Linda down during any of the sexual activity.

THE COURT: And your answer to that is, Mr. Gonzales?

WITNESS: Yes.

BY MS. HERR:

Q All right. Now, you said no earlier and you are saying yes now. Do you want to explain what's going on?

[195]

A I'm nervous.

Q All right. I know you are nervous. It's not an easy thing, right, what you are doing today. But you've taken an oath to tell the truth. Is that what you are doing?

A Yes, ma'am.

Q All right.

MR. TREVINO: Judge, I'm going to object to that. She's trying to badger the witness into complying to what she wants to hear from him.

THE COURT: All right. Just ask questions.

MS. HERR: Thank you, Your Honor.

BY MS. HERR:

Q Did you see Carlos holding Linda down when some of the sexual activity was going on?

MR. TREVINO: Judge, I'm going to object to that as leading and it's also very suggestive.

THE COURT: Overruled. Your answer was what?

WITNESS: Yes.

BY MS. HERR:

Q And when Carlos was holding her down, who was having intercourse with her at that point?

[196]

A Sam.

Q And did that happen also at the top of the hill before they took her down the hill?

A Top of the hill.

Q All right. When you told the Jury earlier that Carlos said, "Come on, it's your turn," that was also at the top of the hill. Is that correct?

A Yes, ma'am.

Q And when Sam wanted you to do it and participate, what did you do?

MR. TREVINO: Judge, she's leading again.

MS. HERR: I asked what he did.

THE COURT: Overruled.

BY MS. HERR:

Q What did you do?

A I went back to the car.

Q Now, when it was all over and everyone came back up to the car, did you notice anything? Did you do anything with Linda's backpack?

A No, ma'am.

Q Did you see anyone there at the top of the hill do anything with Linda's backpack?

A No, ma'am.

Q Do you remember where her backpack was?

[197]

A In the car.

Q Okay. And do you remember if it was either in the front part of the car or if they put it in the trunk?

A The front.

Q Was it in the front seat area or the back seat area?

A Front seat area.

Q All right.

THE COURT: All right. We're going to have to quit for today. And we'll take a recess for this evening and start again tomorrow at 1:00 o'clock. Give you ample time to get your doctor's appointment taken care of. In the meantime, I do not want y'all to discuss the case with anyone or let anybody talk to you about it. I will see you tomorrow at 1:00 o'clock.

(WHEREUPON, the proceedings  
(were recessed for the day.)

**TRIAL TESTIMONY OF DR. VINCENT DiMAIO  
JUNE 24, 1997**

\* \* \*

[60]

removed and be examined outside. At that time we'll take body fluid such as blood or urine; vitreous, which is the fluid in the eye, and that will be submitted to the laboratory for analysis for the presence of alcohol and drugs.

**Q** Also, if there is suspicion of a rape or sexual abuse, what kind of—

**A** In cases like that, we will take swabs of the mouth, the rectum, and of the vagina, and these will be— there will be slides made. And then the swabs will be retained for subsequent examination by the serology section of the criminal investigation laboratory.

**Q** All right. With regard to Linda Salinas, could you tell the Jury briefly or describe the shape the body was in and the clothes that she was wearing?

**A** Yes, ma'am. Essentially she was a young, white female, five feet, two inches tall, weighed 100 pounds, 16 years. When I saw her, she was dressed in a blood-soaked logo t-shirt with figures of Bugs Bunny and the Tasmanian Devil on the front. In addition to the t-shirt, she was wearing white socks with bloodstains on them and white sneakers, again with bloodstains. There were yellow metal ball type earrings in the earlobes, a thin brass-colored ring [61] on her right fourth finger.

**Q** With regard to external examination of the body, what were some of your findings with regard to that?



A She had brown hair averaging 10 inches in length, brown eyes, teeth were in good condition. There were some fly eggs that had been deposited on the body following death, and there were a lot of post mortem ant bites. After she had died, the ants had gotten to the body and bitten it. There were some oak leaves adhering to the body. The letter "L" was tattooed on the inner aspect of the left ankle. There was evidence that she had had heart surgery in the past. There was a scar about six inches in length in the middle of the chest. And subsequent autopsy revealed some suture material in the heart. She had had a hole in the heart, apparently, which had been repaired in the distant past.

Q All right. And with regard then to any evidence of injury, could you explain to the Jury what you saw?

A Okay. There were some post mortem injuries which meant that this had occurred after death and was of no significance. There was smeared blood on the left side of the face and neck and chest, and the abdomen and left side of the chest, and on the legs, forearms, and hands.

[62]

Q Doctor, if I could interrupt you for a moment. What you are describing right now, did they become part of a diagram that you drew when you prepared this report?

A Yes.

Q If I were to put that up, would that help you to explain some of your findings?

A Yes, ma'am.

Q Okay.

(WHEREUPON, the instrument  
(referred to was here marked  
("State's Exhibit No. 88" for  
(identification purposes.)

BY MS. HERR:

Q Dr. DiMaio, I'm going to hand you what's been marked for identification purposes as State's Exhibit No. 88. Do you recognize this?

A Yes. These are blowups of some diagrams that I filled in, illustrating the injuries.

Q All right. Thank you. I'm going to go ahead and place them over here and ask you to step down.

A (Witness complies.) As I said, there were some post mortem ant bites and things that were not significant. There were two bruises; one on the right breast, one on the left breast. They were a [63] blue color and appeared to be very recent bruises. And in addition, there were a number of scratches of the right and left lower legs consistent with, you know, brush, again minor injuries.

The most significant injuries were two stab wounds on the left side of the neck. I designated them Stab Wounds 1 and 2; not necessarily because they occurred in that order, that's just to give them a number so that you can differentiate between them.

Stab Wound No. 1 measures about 20 millimeters in length, which is about three-quarters of an inch. You can see it was inflicted by an instrument with a dull top like a knife and a cutting edge. It was like a blade with a single cutting edge. The

knife track goes into the soft tissue of the neck, does not hit any structures, does not hit any major blood vessels and essentially is a non-lethal type wound.

The second wound is horizontally oriented. It's on the left side of the neck, more towards the back of the neck. The cutting edge was in this front portion. You can see there's a couple of trails from the knife when it was withdrawn. The knife went into the neck, down through the [64] soft tissue and partially severed the carotid artery which is the major blood vessel on the left side of the neck supplying blood to the brain. In this case, it was partially severed, which would result in massive bleeding and death.

Q All right. Can you estimate approximately how long after the infliction of that stab wound it would have taken her to die?

A Oh, the minimum amount of time would be a few minutes. Some people can live longer. What they do is they go into shock and then their blood pressure decreases. When they do that, they can actually live longer. It's kind of a safety mechanism. You don't know whether pressure was applied. You apply pressure, you could slow down the bleeding. But most times consider this as, you know, nothing done they'll usually live a couple of minutes before they die.

Q All right. And you did describe that second stab wound, I believe, with some trailing off there—

A Yes.

Q —indicated. Could you give us a little explanation about that, please?

- A Okay. The knife went in. When it was being pulled out, there was movement so that the cutting edge of [65] the knife ran across the skin, making kind of secondary tracks and before it was fully pulled out. So, it's not a clean in and out. But as it was being drawn out, the cutting edge cut across the skin.
- Q Does that imply like some additional pressure instead of just in and out? Or are you saying just additional—
- A That would mean that the individual pulling out the knife was either wiggling it or the person who was being stabbed was moving.
- Q All right. Now, with regard to any signs of sexual assault, you testified earlier that there is some examination that is done if there's an expected sexual assault. Is that correct?
- A Yes, ma'am.
- Q All right. Swabs or what did you say?
- A Swabs would be taken of the mouth, the rectum, and the vagina. Of course, before we even take the swabs I would do an examination to see if there's any trauma. And the trauma in this case showed an area of soft tissue hemorrhaging or bruising of the vagina. If you look at it, assume that the face of a clock be on the back portion, the 6:00 o'clock position. And then when you looked at the anus, in the anal opening there was bruising at the 1:00 [66] o'clock position and then at the 6:00 o'clock, there was another bruise. And then at the 3:00 o'clock, there was a tear.
- Q Dr. DiMaio—

A I mean—excuse me, at 11:00 o'clock there was a tear.

Q All right. With regard to your description of those—of that trauma, would it be possible for you to take a marker and explain to the Jury what you mean by you referring to them as 6:00 o'clock, 3:00 o'clock, et cetera?

A Yes, ma'am.

Q There's a tablet right up there on the board.

A Okay. If you consider this the vagina, we'll say, you are looking between the legs and this would be her abdomen and this would be the buttocks. Then at the 6:00 o'clock position here, there was a bruise that measured 3 by 3 millimeters.

And then if you look at the anus, but here you are going to have to assume that it's the other way, okay, you are looking at the buttocks up here. And then there at the 1:00 o'clock position, there was a bruise. This is 5 by 3 millimeters. At the 6:00 o'clock, there was a 10 by 2 millimeter area of hemorrhage. And at the 11:00

\* \* \*

**TRIAL TESTIMONY OF LONNIE GINSBERG  
JUNE 24, 1997**

\* \* \*

[130]

A That's correct.

Q Okay. Did you perform another DNA testing?

A I did.

Q What was that?

A The final test that I actually performed is called D1-S80. And we've got a lot of letters and numbers here, but it's just another PCR test that will give us an indication of including or excluding certain individuals as a possible source of a bloodstain.

Q Okay. And what was the result of that testing?

A Using the D1-S80 type of DNA analysis, I was able to positively exclude Santos as a possible contributor of the bloodstain on the underwear. But I was not able to exclude Trevino as a possible blood source on the underwear.

Q Okay. In addition, did you do the D1-S80 on the known sample from Linda Salinas?

A I did.

Q Okay. Once again, what was the result of that?

A Her blood basically could—I was not able to exclude her as well as being—as her blood being part of the blood on the pair of underwear.

Q Okay. At this point—In addition to excluding at this point Santos, but failing to exclude Salinas and Trevino, what—did the D1-S80 testing also tell us



[131] something again? Did it confirm something in the PCR testing?

A Well, it basically confirmed that, once again, the stain on the pair of underpants was a mixture. Basically, I was identifying various banding patterns that would be indicative of a mixture.

Q Okay. And could you explain to the Jury how it is that you knew at this point once again that the blood had to come from two individuals at least?

A Well, on this D1-S80 type of DNA analysis, we're looking at banding patterns similar to—almost like a bar code, but they are a lot more separated. They're not real squished together. But on this particular item, I saw four bands. Well, right away that's indicative of a mixture.

The reason I know that is because each one of us in the D1-S80 type of DNA analysis will only have one or at the most two bands. And the reason for that is once again we go back to DNA. We get 50 percent from our mom and 50 percent from our dad. So one of those bands is going to come from mom and one band is going to come from dad.

Now, there are some rare occasions where an individual will just have one band. And that just basically says that with this [132] particular DNA typing that both parents have that same type of DNA analysis. But in this case, I identified four bands. So I knew I had at least two individuals that had blood or mixture of blood on that particular area of the underwear that I was dealing with.

- Q Now of these three people that were tested, the blood from Linda Salinas, Trevino, and Santos, were anyone of these three one of those types of individuals with just the one band that would have gotten the same type from both parents?
- A No. All three of the individuals, Salinas, Trevino, and Santos, all had two banding. Each person had two bands.
- Q All right. So the basic result of this testing was that Santos was excluded as the donor of blood?
- A That's right.
- Q And you could not exclude Trevino or Linda Salinas?
- A That's correct.
- Q Okay. On your conclusions as to statistical frequencies as to Linda Salinas, what kind of numbers did you come up with?
- A Well, basically what we're asked to do is to give an indication of how common or uncommon a particular DNA profile is, using the specific DNA typing systems [133] that I spoke of. And specifically with Linda Salinas, the various system that I used—do you want me to go through all four of the racial or ethnic?
- Q Just using southwestern Hispanics.
- A Okay. With southwestern Hispanics, and this is once again an approximation, approximately one in every 2,684 southwestern Hispanic individuals will have this various combination of PCR DNA types that I identified. Once again, it's an approximate, but it just gives us all an indication of how common or uncommon that particular type is found.

- Q Well, just so the Jury knows, what are the other—you had—you did four different types of profiles, is that right, based on race?
- A That's right. That's right. We actually calculate because—We're not biased, of course. So, we basically on every report we get, we calculate Caucasian, Black, southeastern Hispanic, and southwestern Hispanic. And I did that on this case as well.
- Q Okay. Why don't you let the Jury know. What are the numbers for Caucasian and—
- A One in approximately 3,664 Caucasian individuals. In the Black population, it's roughly one in 46,223 [184] black individuals. In southeastern Hispanics, it's one in approximately in 5,068 individuals. And once again in the southwestern, it's one in about 2,684 individuals.
- Q The one in 5,068, that was southeastern Hispanics or western?
- A Southeastern.
- Q Okay. And did you do the same statistical analysis for the DNA profile for Trevino?
- A I did.
- Q Okay. Could you tell the Jury? Go down the list of the—
- A Sure. In the Caucasian population, it's roughly one in 93,929 Caucasian individuals. The Black population, it's roughly one in 4,375,800 black individuals. In the southeastern Hispanic population, it's roughly one in 89,549. And finally in the southwestern Hispanic population, it's roughly one in 10,767 individuals.

Q And what logistical—or, I'm sorry. What demographic studies or what data did you use to come up with these numbers?

A The statistics that are used are actually provided by the FBI. They provide us with computer software. That has been used really for several years [136] throughout the whole country. It's comprised of populations throughout the whole U.S. It's not just Texas or Florida or California. It basically encompasses the complete United States. And that's basically why we use this particular set of statistics.

MR. SHAEFFER: Thank you. I pass the Witness.

MR. WILCOX: May I approach the bench?

THE COURT: Uh-huh. Do you want to reserve your cross at this time?

MR. WILCOX: Yes, Judge.

THE COURT: Okay. Well, I need to talk to y'all for a minute about where we go from here. So if you could take the Jury back to the jury room so they can look at the storm outside for a minute. It sounds horrible.

(WHEREUPON, the following  
(proceedings were had outside  
(the presence of the Jury.)

THE COURT: All right. Now that's it for the State's case. This is their last witness. I understand that you want to reserve your cross-examination until after you have an opportunity

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TRIAL TESTIMONY OF LORRAINE REAGAN  
JULY 2, 1997

\* \* \*

[31]

there was conversation, I'm going to be very honest with you, I don't remember.

Q Did his mom come with him to the probation office?

A Some of the time, yes, she did. A lot of times Carlos came by himself.

Q Okay. Did he ever discuss with you what his family relationship was like with his mother?

A Again, you are asking me something that I—I don't want to sit up here and testify to something that I don't have a clear understanding and memory of what was said at that time.

Q Okay. Did you ever have any home visits with Carlos?

A Yes, I did.

Q Tell us about them.

A If I can remember. The Lena Horne is in Sutton Homes, I think. I think it's Sutton Homes. I don't know what you—how you want me to describe that. During that particular time, it was a high crime area. Mom's on AFDC. I can remember Mom having problems trying to discipline him. I mean, not discipline, really, because Carlos was kind of—as I can remember, kind of quiet. Didn't give her a lot of problems but yet still there were times when she probably didn't know where he was at some point in time. I think there were two other siblings, I'm not [32] sure, that were younger than

Carlos. Because Carlos is the oldest. And I think there were a couple of other siblings in the family. I can't remember anything else.

Q So she was a single mom trying to make it with three kids?

A I think it was three. Yes.

Q She was on welfare?

A At that time she was on AFDC.

Q Do you know if she was working?

A No. If you are on AFDC, you can't work.

Q Okay. Did you ever discuss with her and Carlos regarding his schooling, how he was doing in school?

A Carlos—Again, I don't have his school records. But I know Carlos—I can't remember what school he went to at that particular time. But back in '91, Carlos—the first probation, I can't remember what school he was. He was 16, and I know he was having some problems in school and I think eventually dropped out when he went back to court. I would like to say the second time—the second time. I think it was probably about the second time. That was one of his biggest problems.

Q School?

A It was school. It was school.

[33]

Q Did you think he had the support at home necessary to allow him to continue in school?

A That's a question that I don't know how to answer because I can answer it both ways. My experience



with the kids, if the kid wants to go to school and he truly wants to be in school and he has no support, he can still do well in school, especially at an age at that time like Carlos.

Now, on the other hand, I do have kids if there are a lot of problems that are going on in the family and in the neighborhood and that there's influence from other outside forces that causes the kid to not want to be in school, yes, that can stop the individual. So it's kind of left up to the individual how they wanted to succeed in school.

Q Do you know anything about his other two brothers and sisters?

A No, I don't. I sure don't.

Q Okay. During the time he was on probation with you, how often—I mean, how many times did you see him at his home?

A I don't know.

Q More than once?

A I'm sure it was. I don't even remember.

Q And he always lived with his mom during this time?

[34]

A During this time, he was living with his mom. And I think he had a girlfriend at one point was in the home and—I don't know. I think she was a little older than Carlos, and she had a child. And I think that was—

Q Carlos' child?

A I don't think it was Carlos'. I think it was her child.

Q Did he ever stay with his grandfather that you know of?

A He could have, but I don't remember him staying during my time. He could have, but I don't remember him staying with him.

Q As part of your evaluation of Carlos, do you recall if any psychological testing was done?

A The probation department? I don't remember the probation department. We could have tested him. I didn't order it. He could have in ISP, when he was in the other probation. I don't know. He could have been tested.

Q So it would be fairly accurate to say that he came from a pretty poor background as far as financially?

A Financially, yes.

Q And his mom, did you notice anything about her? Did you know if she had a drinking problem or drug [35] problem, anything like that? Did you ever talk to her about those things?

A I don't want to testify to the fact if I remember it or not. I really can't say. I really don't know.

Q And during the time that Carlos was on probation with you, you said he was basically compliant with your orders, even though he did get in trouble again?

A Yes, he did.

Q Okay. And that's not all that uncommon, is it?

A No. Because, see, you also need to be—Carlos was in an area and one of the things as I'm sitting here thinking about, Carlos was associated with some undesirable characters. He denied—And when I

asked him about gang activity, because that's where he lived. That's one, specially in '91. Most juveniles would deny it and say they are not part of the gang.

But I do—On the streets you hear that the DOG, that's drugs, overthrown, gangsters. I have to remember all those gangs. And he alleged to have been part of it. Now, whether Carlos admitted it, I don't know. And when you ask a juvenile if they're part of gangs, some will tell you no or some will say, "I have friends that are in a gang."

[36]

And I remember—and a lot of times you have to tell kids even though they are not a part of a gang, if they have friends that are in a gang and if they are associating and the police or Sheriff's Department can sometimes associate with them. And I do remember that being one of his problems. His association.

Q Okay. And his father was absent, of course?

A To be honest with you, I don't even remember meeting Carlos' father. If I did, it would have probably stayed with me. I just remember working with Carlos and his mother.

Q Nobody else in the family?

A That I can recall. I can't.

Q And then after you finished with your part, he moved on to someone else in the probation department?

A Right. In the intensive supervision program.

Q Thank you.

MR. SHAEFFER: No further questions,  
Your Honor.

THE COURT: All right. Thanks very  
much.

MR. SHAEFFER: State calls John  
Gutierrez.

TRIAL TESTIMONY OF JUAN GONZALES  
JULY 2, 1997

\* \* \*

[84]

Q All right. Could you tell the Jury, please, what was said and who said it?

A That it was cool about—Santos said it was neat about Carlos snapping her neck.

Q All right. And in response to that, what did Carlos say?

A "I learned how to kill in prison."

Q All right. What else did he say about his ability to use a knife?

A That "I learned how to use a knife in prison," too.

Q All right. How is Benito Soto DeLeon related to you?

A He's my grandpa.

Q All right. And that's where Carlos was living for a time when this incident occurred. Is that correct?

A Yes, ma'am.

Q Was he working then?

A Yes, ma'am.

Q What kind of work did he have?

A He had—It was roofing—

Q All right.

A —with his mom's ex-boyfriend.

Q All right. How long had he been staying at your grandfather's house?

A For about a month or two.

Q All right. Where had he been before that?

[85]

A In prison.

MS. HERR: All right. Thank you. I'll pass the Witness.

CROSS-EXAMINATION

BY MR. TREVINO:

Q Mr. Gonzales, you are the same person who just a week ago testified to being a lookout for everybody involved, aren't you?

A Yes, sir.

Q How long have you known Carlos?

A Like mostly all my life.

Q Has he been on his own most of his life?

A Yes.

Q He had to make his own way?

A Yes.

Q His grandfather kind of helped him a little bit. Right?

A Yes.

Q How about his dad? Where has his dad been?

A I don't know.

Q He's never had a dad. Right?

A I don't remember.

Q Okay. His mother, do you ever see his mother?



A Yes.

Q How do you get along with Carlos?

\* \* \*

**TRIAL TESTIMONY OF JUANITA DeLEON  
JULY 2, 1997**

[135]

JUANITA DeLEON,

the witness, after first being duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, testified upon oath as follows:

**DIRECT EXAMINATION**

**BY MR. TREVINO:**

Q Ma'am, please state your name.

A Juanita DeLeon.

Q What is your relationship to Carlos Trevino?

A I'm his aunt.

Q How long have you known Carlos?

A All his life.

Q All his life? Where is Carlos' mother?

A She has an alcohol problem right now.

Q Excuse me?

A She has an alcohol problem.

Q So where is she?

A In Elgin.

THE COURT: Where?

WITNESS: Elgin.

THE COURT: Elgin?

WITNESS: Uh-huh.

BY MR. TREVINO:

Q So she couldn't make it. I don't know him. Where is Carlos' father?

[136]

A I don't know him.

Q How old is Carlos' mother?

A 39.

Q Where did Carlos go to school?

A He went with me to (inaudible) and then he went to Harlandale. And Sam Houston I think was the last one.

Q How did he do in school?

A He did okay.

Q Did you go to school with him?

A Yeah.

Q Did you have any classes together?

A No.

Q Did he belong to any school clubs or anything like that while he was there?

A No.

Q Pretty much on his own?

A Yeah.

Q How would you describe the family's finances? How much money do they have?

A What?

Q How much money was available?

A I don't know.

Q Was he on welfare?

A Yeah, my sister was.

[137]

Q The whole family?

A Yeah.

Q How many brothers and sisters does he have?

A One brother and one sister.

Q Why did he drop out?

A I don't know.

Q But you do know he did. Right?

A Yeah.

Q What did he do after that?

A He started working with Ruben.

Q Who is Ruben?

A My sister's ex-boyfriend.

Q What kind of work did he do?

A Roofing.

Q Where was he living during this time?

A With Janet.

Q Who is Janet?

A His girlfriend.

Q When did he meet Janet?

A I think when he had got out of school or when he was in school. I don't remember.

Q How old do you think he was?

A Like about 17 or 18.

Q Who is Janet?

A His girlfriend.

[138]

Q Is she more than his girlfriend?

A Well, they were living together, yeah.

Q Do they have any children together?

A Yes. One.

Q How old is he or she?

A He's five.

Q Now. You said Carlos lived with you?

A Uh-huh.

Q Do you have children of your own?

A Yes. I have two girls.

Q Did he ever take care of your children?

A Yeah. He would always take care of them for me. When I would go to work, when there was no job with Ruben, he would stay home and take care of them for me.

Q How is he around children?

A Well, my girls loved him. They were attached to him. When he would go to the store, they would want to go with him.

Q How did he get along with other people in the family?

A He got along with everybody.

Q How long did he work as a roofer?

A For a long time.

Q When Carlos was around you, how would you describe Carlos? Was he a violent guy? A nice guy?

[139]

A No.

Q How is he?

A He's real easy to get along with. I would always tell him my problems. He would always give me advice.

Q How old are you?

A I'm 23.

Q And how old is Carlos?

A 22

Q 22?

A Yes.

Q You used to live with your father?

A Uh-huh.

Q When he was in school, did he ever play any games?

A Well, when we used to—after school we used to go to the park normal like a recreation and we would play games there.

Q What kinds of stuff did y'all do?

A Basketball, checkers. They had a lot of games there.

Q So Carlos has been on his own most of his life?

A Yeah.



Q Now, you know that Carlos has been found guilty of capital murder. Right?

A Yeah.

Q In your opinion is he the kind of person that would [140] do something like that?

A No. Huh-uh. I know he didn't do it. He's not the type that would do something like that. I don't care what anybody says. I know he didn't do it.

Q Is there anything else you would like to tell the Jury?

A That he's not the type of person that would do anything like that. Y'all have to know him. People make him sound like he's real mean and everything and he's not. I mean, my daughters loved him. He would never do anything to anybody.

Q He went up to prison for stealing a car. Right?

A Yeah.

Q And he was a real young guy when he did that?

A Yeah.

Q He paid for that. Right?

A Yeah.

MR. TREVINO: Pass the Witness, Judge.

CROSS-EXAMINATION

BY MS. HERR:

Q You know about his trouble when he was a juvenile. Right?

A Yeah.

Q Now, is he the type of person that will do that?  
Steal cars?

[141]

A Yeah. But I mean, he wouldn't hurt anybody.

Q Now, Is he the type of person that will carry a  
weapon?

A No.

Q Is he the type of person that will smoke marijuana?

A No.

Q Okay. Is he the type of person that will steal some-  
one's car?

A Well, he did that once and he got caught. But I  
don't think he would ever do it again. I mean, I  
know him.

Q So if he's out there doing it, you just don't want to  
believe he does it, do you?

A No, because he doesn't do it.

MS. HERR: Pass the Witness.

MR. TREVINO: I have no further

THE COURT: All right. Thank you, Ms.  
DeLeon.

MR. TREVINO: We have no further  
witnesses, Judge. Defense would rest.

MS. HERR: State closes.

MR. TREVINO: Defense closes, Judge.

\* \* \*

[149]

THE STATE OF TEXAS    )  
COUNTY OF BEXAR        )

I, HOLLY DIETERT RHODES, Official Court Reporter for the 290th District Court of Bexar County, Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings (or all proceedings directed by counsel to be included in the statement of facts, as the case may be) in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS my hand this the 18th day of February, A.D. 1998.

---

HOLLY DIETERT RHODES  
Official Court Reporter  
290th District Court

Certification Number of Reporter: 2559  
Date of Expiration of Current Certification: 12/31/99  
Business Address: 290th District Court  
Bexar County Justice Center  
San Antonio, Texas 78205-3025  
(210) 335-2696

**CLOSING ARGUMENT  
ON BEHALF OF CARLOS TREVINO  
JULY 3, 1997**

\* \* \*

[25]

what you want. There's obviously no premeditation. If you remember when we talked about this in voir dire, you can form intent in an instant. And that's fine. But premeditation also tells you that there's a plan and a scheme. They were all prowling around ready to kill somebody. That's not what happened here. This is something that happened, that was brought up in the mind of Santos and perhaps Brian. Not in his. He didn't know the young lady. But for those guys, that young lady would be alive right now. He didn't talk to her in the car. He didn't say anything. Who took off her bra? Who talked her into the car? Who did she know? Those are all the other people.

You heard his—Mr. Trevino as you heard has come from a pretty harsh background. His father has been nonexistent. His mother couldn't even come up here to talk to you, to ask for her son's life. She's an alcoholic. How much of a chance did he have? He's been in trouble. He's been out on the streets. His probation officer said he lived in a very rough neighborhood. Yeah, he's committed a few crimes but if you look at them, they are not the signs of an evil person. There's no evil in those crimes that they brought up to you. Yeah, [26] they are criminal. Possession of marijuana, unlawfully carrying of a weapon, maybe a criminal trespass, taking a car. Fine. Okay. They are there. Is that an evil person that does that? No. It's some kid that's lost, wandering around in the neighborhood. On those facts they want you to condemn him to death.

That's unfair. The other party, the one that's uncharged, he's walking out there right now. Is that fair?

Ladies and gentlemen, Linda Salinas did not deserve to die. I agree with you on that. She didn't deserve to die. There are many people who are dead who did not deserve to die. But can you give them life? No. So, I suggest that you think long and hard before you take what you cannot give. Thank you.

MR. WILCOX: May it please the Court?

THE COURT: Yes, sir.

MR. WILCOX: May it please you, ladies and gentlemen of the Jury, Mr. and Ms. Prosecutors. I'm going to take a few minutes to go through what I consider to be the appropriate function of the Jury in this section of the trial.

You are to determine punishment [27] and you are to determine punishment—the window narrows in now. And it narrows in on this individual himself, his past, his personal being. Not on Brian Apolinar, not on Santos, not on anybody else, but on him. I'm going to tell you up-front. The first issue, does he constitute a continuing threat to society by the probability of committing criminal acts of violence in the future. They haven't met that burden. Okay? In 27 years of practice, I've stood on this side and I've stood on this side. I've asked people to put people to death. I've asked people not to put people to death. Okay?

When you approach this first issue, it's not the inquiry about how many chances, because then you have to ask yourself if that's the criteria, then you've got to come over here and you've got to ask these people, the prosecution, well now, who have you given a chance to? Who have you given a chance to?

They come up here and they put up this criminal history and all these nice neat things that they can do, and they say chance, chance, chance, chance, chance. Okay? Half of these are not criminal offenses because it's juvenile. And we don't say juveniles are criminals. We carry them [28] under the Family Code. Okay? So only when they get to be adults, 17 years of age or older, then they come into the Criminal Justice System as criminals. But they are low grade. They are not violent. It's there.

Now, when you get down to here and we talk about the chance and we talk about fairness and we talk about equal application of our laws, responsibility. They have control. They have decided. They have taken that decision away from you. They have taken that decision away from me. They have taken that decision away from the community of Bexar County, and they've said what? You got a free killing, you got a free rape, and not only that, you've got a free perjury charge. You've got a free—given a false statement to police officers. Nobody takes him into custody. Nobody says would you mind standing out there and let them take you downstairs. Amazing. Our system of justice in Bexar County. And yet the same people that called for this man's death make the decision to give a co-conspirator, a party to the offense, life, a chance in your community. Okay?

Now, somewhere down the line if he comes back in here and is sitting up there, then [29] they're going to get up and they're going to put up one of those boards and say, well look at all the chances he got. Think about that. Okay? And then you've got to think this admitted perjurer, this admitted liar, is the strength of what they want you to put him to death on. Okay?



Now, let's direct the inquiry. Here's a young kid. He's not different from any other kid in Bexar County, in the environment that he grew up in and what was put on him. Okay? I'm not here to justify it. Like Ms. Reagan, the juvenile probation officer says, it doesn't matter if you are poor or down-and-out or anything like that, if you want to make it—something of yourself, you'll do it. I agree with that. There's no problem.

But real life, reality is that there are all sorts of external influences that come into play upon them, the pressures, that kind of directs your answers whether you want them to or not. Okay? The friends you want to have. Got to take that into consideration. And I agree with Ms. Reagan. After she said it, gosh, when he was on probation down here with us in juvenile, he did well. He was good. Yeah, but he kept committing offenses. Well, yeah. Take the total picture. And I had to [30] figure out where he lived, mother being an alcoholic, no control over him, the friends that he was running around with. But he was still good. He was a success. Quote. Now—and that's reflected here. First juvenile, 13-years-of-age. And I may appear to be callous sometimes. Okay? I see this day to day. You people don't. And I've got to remember that. Because you are coming in here and maybe your experience is the first time and it may shock you. If I appear callous, it's because it doesn't shock me. Nothing. We don't even know what the first one was for. Truancy? Who knows.

Second referral. Unauthorized use of a motor vehicle. Okay? Joyriding. Wow. Well, let's just go and let's just put every kid to death that joyrides a motorcycle or somebody's car, my Porsche, Nelson Atwell's Cadillac. Okay? That's not criteria. God. Wipe out a

good portion of Bexar County, better than 10 percent. We don't do that. If we do, then we better stop and we better reflect upon ourselves, because then we're no better than the individual that killed out there. And a lot of times and one thing here, you've seen the way this thing has unfolded, objections were made. We follow the rules. Okay? I'm a stickler for rules. Because if

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**CRIMINAL APPEALS  
 CERTIFICATE OF AUTOMATIC APPEAL OF  
 CAPITAL MURDER  
 TO THE COURT OF CRIMINAL APPEALS IN  
 AUSTIN, TEXAS**

TRIAL COURT NO. 97-CR-1717D

|                                                            |                                                                                           |
|------------------------------------------------------------|-------------------------------------------------------------------------------------------|
| THE STATE OF TEXAS<br><br>VS.<br><br><u>CARLOS TREVINO</u> | IN DISTRICT<br>COURT<br><u>290TH</u> JUDICIAL<br>DISTRICT OF<br>OF BEXAR<br>COUNTY, TEXAS |
|------------------------------------------------------------|-------------------------------------------------------------------------------------------|

THE RECORDS OF THE DISTRICT CLERK'S OFFICE REFLECT THE FOLLOWING:

1. Defendant filed motion for new trial XX no \_\_\_ yes, date filed \_\_\_\_\_.
2. Automatic Appeal on JULY 3, 1997.
3. The Honorable JUDGE SHARON MACRAE presided at the trial.
4. The above named defendant was convicted of the offense (s) of CAPITAL MURDER.
5. State's trial attorney (s): TYDEN SHAEFFER/ TESSA HERR  
 State's appeal attorney: Edward F. Shaughnessy III 300 Dolorosa, Suite 4025, Bexar County Justice Center, San Antonio, Texas, 78205, (512) 220-2413, SBN \_\_\_\_\_
6. Trial Attorney (s): MARIO TREVINO/ GUS WILCOX (~~Retained~~) (Appointed) Appeals attorney: RICHARD LANGLOIS  
 Address & Phone No. 217 ARDEN GROVE AVE.

S.A., TX 78215-3306 SBN: 11922500 (210) 225-0341  
 Defendant Pro-Se \_\_\_\_ yes XX no

7. The trial held was: \_\_\_\_ trial before the Court  
 \_\_\_\_ Jury Trial on guilt only \_\_\_\_ Jury trial on  
 punishment only XXX Jury trial guilt and punish-  
 ment \_\_\_\_ other
8. The sentence of DEATH was imposed on JULY 3,  
1997.
9. Defendant is presently in: XX BCADC \_\_ TDCJID.
10. Name and address of Court Reporter (s) who re-  
 ported the evidence HOLLY RHODES 300  
DOLOROSA BEXAR COUNTY JUSTICE  
CENTER 220-2696
11. If two or more cases were tried together, the other  
 cases that have been or may be appealed are: (De-  
 fendant's name and docket number)

WITNESS MY HAND THIS THE 7TH DAY OF JULY, 1997.

COURT REPORTER (S): CRT REPT ON VAC. TIL 7/21/97  
 Date: \_\_\_\_\_

\_\_\_\_\_  
 Date: \_\_\_\_\_

TROY BENNETT, CLERK  
 COURT OF CRIMINAL APPEALS, AUSTIN, TEXAS

BY: \_\_\_\_\_ Date: \_\_\_\_\_  
 Deputy

DAVID J. GARCIA, DISTRICT CLERK  
 OF THE 290TH COURT OF BEXAR  
 COUNTY, TEXAS

BY: /s/ Beatrice Gonzales  
 DEPUTY DISTRICT CLERK

97-CR-1717D

|                |   |                            |
|----------------|---|----------------------------|
| STATE OF TEXAS | § | IN THE DISTRICT<br>COURT   |
| VS.            | § | 290TH JUDICIAL<br>DISTRICT |
| ROBERT TREVINO | § | BEXAR COUNTY,<br>TEXAS     |

***MOTION TO PAY INVESTIGATOR*****TO THE HONORABLE JUDGE OF SAID COURT:**

NOW COMES ROBERT TREVINO, defendant, by and through his Attorney of record, MARIO A TREVINO, and moves the court to make payment to EDWARD C. VILLANUEVA, Court appointed Investigator and for good cause respectfully shows the Court the following:

**I**

EDWARD C. VILLANUEVA was appointed by the Court to assist the undersigned in the investigation of the facts of this cause. EDWARD C. VILLANUEVA has preformed various investigative duties as outlined in the time activity log attached hereto and marked as Exhibit "A". The described services have a value of \$476.00.

**II**

The undersigned would show the Court that the Defendant in this cause of action is indigent and too poor to make payment, and therefore, it will be necessary that the Court authorize the payment by the State and County to aforesaid Investigator.

WHEREFORE, PREMISE CONSIDERED, it is prayed that the Court order the payment to EDWARD C. VILLANUEVA, Court-appointed Investigator, payment in the sum of \$476.00.

Respectfully submitted,

/s/ Mario A. Trevino  
**MARIO A. TREVINO**  
 315 S. main Avenue  
 San Antonio, Texas 78204  
 State Bar No. 20211250  
 Attorney For Defendant

**ORDER**

On the 8 day of July, 1997, came to be considered the aforementioned Motion For Payment Of Investigator, and the Court having considered the same is of the opinion that the Motion For Payment Of Investigator should in all things be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that EDWARD C. VILLANUEVA receive \$476.00 for services rendered in the above-styled and numbered cause from the State and County.

/s/ Sharon MacRae  
**JUDGE PRESIDING**



**EDWARD C. VILLANUEVA**  
**Detect Investigation Company**  
**7431 Meadow Breeze**  
**San Antonio, Texas 78227-1631**

July 7, 1997

96-A45V-0812

**Mario A. Trevino**  
**315 S. Main Avenue**  
**San Antonio, Texas 78204**

Re: Robert Trevino

97-CR-1717D

Investigative services from 01-10-97 to 07-03-97.

- 052897 Met Attorneys discussed case, reviewed States file with G. Wilcox; viewed video tape crimé scene.(1.75)
- 052997 Delivered clothes to BCJC for C. Trevino, discussed serology needs and re-locate of witness; attempt locate J. Gonzales; long distant class to Fort. Worth & Dallas, Tx; interview T. Ekis; faxed 1 page letter to J. Floyd.(3.0)
- 060297 Re-discussed serology evidence and needed testimony with Attorneys.(1.0)
- 060997 Discussed C. Trevino prison records and punishment phase testimony with Attorney; prepared subpoena appl. obtained and mailed subpoeana to TDC.(1.75)
- 061897 Conferred with Attorneys, prepared and faxed letter to J. Floyd; briefed attorneys; located and re-interviewed J. Gonzales.(4.25)
- 062097 Faxed 3 page letter to J. Floyd, discussed case with Attorneys.(1.25)
- 062497 Discussed case with Attorney's.(0.75)

|                                                 |                                                                                                                                                                                                                                                         |           |
|-------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| 062597                                          | Prepared subpoena application for BCACSC records of C. Trevino, obtained atty's signature and submitted to District Clerk's Office; discuss case with Atty.(1.75)                                                                                       |           |
| 062697                                          | Obtained subpoena from District Clerk, executed process and interviewed L. Aldridge, reviewed records 93-CR-6532W; prepared subpoena application, obtained S.O. Woods subpoena for TDC disciplinary records C. Trevino, mailed subpoena FedEx. TDC(2.5) |           |
| 062797                                          | Discussed case with Attorney's.(0.75)                                                                                                                                                                                                                   |           |
| 070197                                          | Re-interview J. DeLeon.(0.25)                                                                                                                                                                                                                           |           |
| 070297                                          | Re-interview P. Sanchez, J. DeLeon.(1.0)                                                                                                                                                                                                                |           |
| 070397                                          | Discussed case with Attorney's.(0.75)                                                                                                                                                                                                                   |           |
|                                                 | (19.5 hrs at \$20.00 per hour)                                                                                                                                                                                                                          | \$ 390.00 |
| Mileage:                                        | 052897(13) 052997(32)<br>060297(13) 060997(18)<br>061897(54) 062097(13)<br>062497(13) 062597(13)<br>062697(13) 062797(13)<br>070297(13) 070397(13)                                                                                                      |           |
|                                                 | (221 miles at \$.25 per mile)                                                                                                                                                                                                                           | \$ 55.25  |
| Expenses:                                       | (parking)                                                                                                                                                                                                                                               | \$ 8.80   |
|                                                 | (long distance calls)                                                                                                                                                                                                                                   | \$ 15.70  |
|                                                 | (postage)                                                                                                                                                                                                                                               | \$ 5.45   |
| COST OF PROFESSIONAL SERVICES                   |                                                                                                                                                                                                                                                         | \$ 476.00 |
| State Sales Tax @ .0775 (Exemption #74-2002039) |                                                                                                                                                                                                                                                         | \$ .00    |
| TOTAL COSTS                                     |                                                                                                                                                                                                                                                         | \$ 476.00 |

Edward C. Villanueva  
Owner-Manager

Exhibit "A"

[STAMP:

FILED

10 O'CLOCK AM

JUL [illegible] 1997

DAVID J. GARCIA

CLERK OF THE COURTS

BEXAR COUNTY, TEXAS

BY [illegible]

DEPUTY

[handwritten note: Refiled as 97CR1717D]

**94-CR-4111-B**

|                |   |                            |
|----------------|---|----------------------------|
| STATE OF TEXAS | § | IN THE DISTRICT<br>COURT   |
| VS.            | § | 290TH JUDICIAL<br>DISTRICT |
| ROBERT TREVINO | § | BEXAR COUNTY,<br>TEXAS     |

**ORDER**

On the 4 day of Feb, 1997, came to be considered the aforementioned Motion For Authorization Of Payment Of Expenses And Fees For Investigator In Excess Of Maximum Authorized Fee. After Consideration of same, this Court is of the opinion that the same be (GRANTED) (~~DENIED~~) and now approves the incurring of investigative expenses in a total sum not to exceed \$1000.00, including the \$500.00 previously authorized.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that EDWARD C. VILLANUEVA receive \$500.00 for services already rendered in the above-styled and numbered cause from the State and County.

SIGNED AND ENTERED THIS 4 day of Feb, A.D., 1997.

/s/ Sharon MacRae  
JUDGE PRESIDING

NO. 97-CR-1717D

|                |   |                            |
|----------------|---|----------------------------|
| STATE OF TEXAS | § | IN THE DISTRICT<br>COURT   |
| VS.            | § | 290TH JUDICIAL<br>DISTRICT |
| CARLOS TREVINO | § | BEXAR COUNTY,<br>TEXAS     |

***MOTION TO WITHDRAW AS ATTORNEY OF  
RECORD***

**TO THE HONORABLE JUDGE OF SAID COURT:**

Now comes MARIO A. TREVINO, AND GUS WILCOX and moves to withdraw as attorneys of record for Carlos Trevino in the above entitled and numbered cause, and for good cause shows the following:

**-I.**

Carlos Trevino was found guilty of Capital Murder and assessed the death penalty. After a discussion with defendant it was agreed that other counsel should represent him in the appeal.

WHEREFORE, PREMISES CONSIDERED, the undersigned requests permission to withdraw as counsel of record.

Respectfully submitted,

Mario A. Trevino  
315 S. Main  
San Antonio, Texas 78204  
226-0026

/s/ Gus Wilcox  
315 S. Main  
San Antonio, Texas 78204

BY: /s/ Mario A. Trevino  
MARIO A. TREVINO  
STATE BAR NO.: 20211250

---

GUS WILCOX  
STATE BAR #21450000

ATTORNEYS FOR DEFENDANT

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing Motion to Withdraw As Attorney of Record was delivered to the District Attorney's Office, at BEXAR COUNTY JUSTICE CENTER, SAN ANTONIO, TEXAS 78205, on \_\_\_\_\_, 1997.

Mario A. Trevino  
315 S. Main  
San Antonio, Texas 78204  
226-0026

BY: /s/ Mario A. Trevino  
MARIO A. TREVINO  
STATE BAR NO.: 20211250

ATTORNEY FOR DEFENDANT

**ORDER**

On \_\_\_\_\_, 1997, came on to be considered the Motion to Withdraw as Attorneys of Record in the above styled and numbered cause, and said motion is hereby

(GRANTED)

(~~DENIED~~).



308

/s/ Sharon MacRae  
JUDGE PRESIDING

[STAMP:

[illegible]

97 JUL -9 PM 1:49

DEPUTY

BY /s/ Sylvia Hernandez]

[handwritten note: 75 days  
9/15/97]

NO. 97-CR-1717D

|                |   |                            |
|----------------|---|----------------------------|
| STATE OF TEXAS | § | IN THE DISTRICT<br>COURT   |
| vs.            | § | 290TH JUDICIAL<br>DISTRICT |
| CARLOS TREVINO | § | BEXAR COUNTY,<br>TEXAS     |

***MOTION FOR NEW TRIAL***

**TO THE HONORABLE JUDGE OF SAID COURT:**

Now comes Carlos Trevino, defendant in the above-styled and numbered cause, and files this Motion for New Trial pursuant to Rule 30 of the Texas Rules of Appellate Procedure, and in support thereof shows the following:

**I.**

Sentence was imposed on JULY 3, 1997. This motion for new trial is therefore due on or before AUGUST 3, 1997.

**II.**

A. Defendant was denied effective assistance of counsel during voir dire. The right to be represented by counsel includes counsel's right to question the members of the jury panel to intelligently exercise peremptory challenges. Defendant's trial counsel was denied the opportunity to question and discover jurors' views on an issue applicable to the case, to wit: scientific evidence/DNA. During pre-trial hearing Defendant's trial counsel was informed by the State that no

DNA evidence connecting this defendant to the crime had been found and that there was no DNA evidence to be used in Defendant's trial. After 11 jurors had been accepted by defendant to hear this case, the State informed Defendant's counsel that DNA blood testing conducted on the victim's panties did in fact connect this defendant to the crime.

B. The Court erred in denying defendant's Motion For Continuance. After the jury had been selected but prior to the jury being sworn, defendant's trial counsel moved for a continuance based on the facts related above. The trial court denied the motion for continuance. Consequently, Defendant was denied effective assistance of counsel because he was forced to proceed to trial without adequate preparation to cross examine the state's expert witness his DNA testing procedure and the results of his DNA testing.

WHEREFORE, PREMISES CONSIDERED, defendant prays that this Court grant his Motion for New Trial and enter a judgment of acquittal. Alternatively, defendant prays that this Court grant his Motion For New Trial.

Respectfully submitted,

Mario A. Trevino  
315 S. Main  
San Antonio, Texas 78204  
2260026

BY: /s/ Mario A. Trevino  
Mario A. Trevino  
STATE BAR NO.: 20211250

ATTORNEY FOR DEFENDANT

### CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion For New Trial was delivered to the District Attorney's Office, at BEXAR COUNTY JUSTICE CENTER, SAN ANTONIO, TEXAS 78205, on 7-25, 1997.

Mario A. Trevino  
315 S. Main  
San Antonio, Texas 78204  
2260026

BY: /s/ Mario A. Trevino  
Mario A. Trevino  
STATE BAR NO.: 20211250

ATTORNEY FOR DEFENDANT

### CERTIFICATE OF PRESENTATION

I certify that I am counsel for defendant in this case and that I presented this motion to the trial court on [handwritten note: 7-25-97], within 10 days after filing it.

/s/ Mario A. Trevino  
Mario A. Trevino

### ORDER SETTING HEARING DATE

IT IS ORDERED that the hearing on this Motion For New Trial, having been presented to the trial court within 10 days after its filing, is hereby set for \_\_\_\_\_, 1997, at \_\_\_\_\_ o'clock, in the \_\_\_\_\_ courtroom of the 290 Judicial District Court of Bexar County, Texas.

\_\_\_\_\_  
JUDGE PRESIDING

No. 97-CR-1717D

|                |   |                            |
|----------------|---|----------------------------|
| STATE OF TEXAS | § | IN THE DISTRICT<br>COURT   |
| vs.            | § | 290TH JUDICIAL<br>DISTRICT |
| CARLOS TREVINO | § | BEXAR COUNTY,<br>TEXAS     |

*FIAT*

On \_\_\_\_\_, 1997, came on to be considered the Motion For New Trial, and said matter is hereby set for a hearing on \_\_\_\_\_, 1997, at \_\_\_\_\_ o'clock, in the 290 Judicial District Court of Bexar County, Texas.

SIGNED on the date set forth above.

---

JUDGE PRESIDING

**ORDER FOR NEW TRIAL**

On this the \_\_\_\_\_ day of \_\_\_\_\_, 1997, came on to be heard defendant's Motion For New Trial, and it is hereby

(GRANTED) (DENIED).

---

JUDGE PRESIDING

STATE OF TEXAS

§

§

COUNTY OF BASTROP

§

**AFFIDAVIT**

BEFORE ME, the undersigned authority, on this day personally appeared Mario A. Trevino, who after being duly sworn stated:

"I am the attorney for the defendant in the above entitled and numbered cause. I have read the foregoing Motion for New Trial and swear that all of the allegations of fact contained therein are true and correct."

/s/ Mario A. Trevino

Mario A. Trevino

Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on July 24, 1997, 1997, to certify which witness my hand and seal of office.

/s/ Nancy S. Garcia

Notary Public, State of Texas

[STAMPS:

NANCY S. GARCIA  
My Commission Expires  
October 18, 1997

[illegible]

97 JUL [illegible]

BY [illegible]



NO. 97-CR-1717D

|                                      |   |                            |
|--------------------------------------|---|----------------------------|
| THE STATE OF TEXAS                   | § | IN THE DISTRICT<br>COURT   |
| V.                                   | § | 290TH JUDICIAL<br>DISTRICT |
| CARLOS TREVINO<br>aka ROBERT TREVINO | § | BEXAR COUNTY,<br>TEXAS     |

***APPLICATION TO DISCLOSE JURY INFOR-  
MATION LIST***

TO THE HONORABLE COURT OF APPEALS:

COMES NOW, defendant, by and through his undersigned counsel of record and respectfully moves this Honorable Court, to order the clerk of the court to include in the transcript the defendant's Application to Disclose Jury information Lists and defense counsel's jury personal information lists, and in support thereof would show unto the court the following:

I.

Appellant was convicted by a jury, upon a plea of not guilty, for the felony charge of Capital Murder in Cause No. 97-CR-1717D in the 290th District Court, Bexar County, Texas, the Honorable Judge Sharon MacRae, presiding. Punishment assessed by the court was a term of death. Sentence was pronounced by the court on July 3, 1997. A Notice of Appeal was filed on July 3, 1997.

II.

The transcript on appeal is due to be filed in the Court of Appeals on October 31, 1997, in accordance to Rule 54(b), Texas Rules of Appellate Procedure. The

jury list of jury personal information along with defense counsel notes will not be included in the transcript on appeal. Such list was ordered by the court to be surrendered by defense counsel immediately after the jury was seated. That jury personal information list is essential to a fair determination of an issue raised on appeal.

In accordance with Article 35.29, Texas Code of Criminal Procedure, application must be made before the trial court for disclosure of personal jury information, see *Falcon v. State*, 879 S.W.2d 249 (Tex. App.-Hous.[1 Dist.] 1994).

WHEREFORE, PREMISES CONSIDERED, the defendant respectfully requests this Honorable Court to grant defendant's Application to Disclose Personal Jury Information Lists and thereafter enter an order to the district clerk of the court to prepare a Transcript on appeal to include defendant's Application to Disclose Personal Information Lists and defense counsel's copy of personal jury information lists along with any notes by defense counsel.

Respectfully submitted,

BY: /s/ Richard E. Langlois  
RICHARD E. LANGLOIS  
217 Arden Grove  
SAN ANTONIO, Texas 78215  
Tel. (210) 225-0341  
Fax (210) 225-0345  
State Bar No. 11922500  
ATTORNEY FOR APPELLANT

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above Application to Disclose Personal Jury Information was mailed to the Bexar County District Attorney's Office, 300 Dolorosa, San Antonio, Texas 78205 on this the 4 day of August, 1997.

/s/ Richard E. Langlois  
RICHARD E. LANGLOIS

THE STATE OF TEXAS  
COUNTY OF BEXAR

BEFORE ME, the undersigned authority, on this day personally appeared, Richard E. Langlois, who being by me duly sworn, upon oath says that he is the attorney of record for the defendant in the above and foregoing motion, and that the statements contained therein are true and correct.

/s/ Richard E. Langlois  
RICHARD E. LANGLOIS

SUBSCRIBED AND SWORN TO BEFORE ME, this 4 day of August, 1997, to certify which witness my hand and official seal of office.

/s/ Irene Pokloff  
NOTARY PUBLIC In and For  
Bexar County, Texas

[STAMP:

IRENE POKLOFF  
My Commission Expires  
November 8, 1997]

NO. 97-CR-1717D

|                    |   |                            |
|--------------------|---|----------------------------|
| THE STATE OF TEXAS | § | IN THE DISTRICT<br>COURT   |
| V.                 | § | 290TH JUDICIAL<br>DISTRICT |
| CARLOS TREVINO     | § | BEXAR COUNTY,              |
| aka ROBERT TREVINO |   | TEXAS                      |

**ORDER**

On this day came on to be heard the foregoing defendant's APPLICATION TO DISCLOSE JURY INFORMATION LIST and the court finds that it has jurisdiction of said motion and that the State of Texas has been served with a copy of said motion and the court finds that said motion is authorized pursuant to Article 35.29, Texas Code of Criminal Procedure, and it is hereby;

ORDERED that the clerk of the court prepare a transcript for appeal in Cause No. 97-CR-1717D to include a copy of defendant's APPLICATION TO DISCLOSE JURY INFORMATION LIST and a copy of defense counsel's jury personal information lists along with any of defense counsel's notes.

SIGNED and RENDERED this \_\_\_\_ day of \_\_\_\_\_, 1997.

---

JUDGE PRESIDING

[STAMP:

[illegible]

97 AUG -5 AM 10:59

DEPUTY

BY [illegible]]

No. 72,851  
IN THE COURT OF CRIMINAL APPEALS  
AUSTIN, TEXAS

---

CARLOS TREVINO,

*Appellant*

vs.

THE STATE OF TEXAS,

*Appellee*

---

ON APPEAL FROM THE DISTRICT COURT  
290TH JUDICIAL DISTRICT  
OF BEXAR COUNTY, TEXAS  
CAUSE NO. 97-CR-1717D

---

BRIEF FOR APPELLANT

---

\* \* \*

commissary items within the institution. As such a member Morrill described that they take oaths of allegiance to their gang. (RR. XVIII, PP-105-06). Morrill tendered a copy of the rules which is a document that comes in through the mails. They are found in confirmed members of HPL. (RR. XVIII, pp-107-09: Sx-103). Morrill read the document before the jury. (RR. XVIII, PP-110-12). Appellant was placed in administrative segregation at the Coffield unit for two years until his release on parole. (RR. XVIII, PP-113). Morrill acknowledged that appellant was paroled and that there were no recorded instances of disciplinary actions taken against appellant. (RR. XVIII, pp-117-21, 131). Morrill had no personal knowledge about ap-

pellant and could not testify that appellant ever read the rules of the HPL. The document read before the jury was not taken from appellant. (RR. XXII, p-122).

Appellant was twenty-two years old at the time of the murder. Juanita DeLeon, appellant's aunt, testified that his mother was an alcoholic. Based upon his mother's age, appellant was born when she was approximately sixteen years old. (RR. XVIII, pp-135-36) His family was on welfare. Appellant had one brother and one sister. When appellant left school he lived with his girlfriend and they had a child. Appellant worked for his mother's boyfriend as a roofer. (RR. XVIII, PP-137). DeLeon described appellant as a loving person with her two girls and he got along with everyone in his family. She did not describe appellant as a violent person and would not be the type of person to commit a violent murder. (RR. XVIII, pp-139-40).

Appellant contends that the evidence was insufficient to sustain a finding of future dangerousness. Applying the factors set forth in *Keeton supra* would negate the rationality of the finding by the jury. Appellant was one of five individuals involved in this crime. The girl voluntarily got into the vehicle with Santo Cervantes who initiated the sexual assault along with Brian Apolinar, and Siendio Rey. According to the testimony of Juan Gonzales, Appellant did not engage in sexual intercourse with Linda Salinas. At most he held her down one time. And Juan Gonzales never observed appellant to stab the victim. All five individuals were equally culpable and only appellant was prosecuted to receive the death penalty. The crime was not the result of prior planning. Appellant's prior record was for non violent offenses. Appellant performed well on juvenile probation and was released on parole. While appellant was designated a gang member, there was no testi-



mony to link appellant to any gang activity in prison. The only link to gang affiliation was that of his tatoos. Appellant's aunt described appellant as a loving and caring individual who was twenty-two years of age. His mother was an alcoholic who did not attend his trial because of her illness. Appellant was raised on welfare, but left school to work and support his girlfriend and child.

A sentence of death is the ultimate punishment and should only be assessed to those who deserve it. Appellant is not one of those individuals. This court should set aside the findings of the jury regarding their findings on Special Issue No. 1.

**POINT OF ERROR NO. 7:**

**THE TRIAL COURT ERRED IN ADMITTING EVIDENCE FROM BOB MORRILL ON THE RULES OF THE LA HERMIDAD Y PISTOLEROS LATINOS AT THE PUNISHMENT PHASE.**

**STATEMENT OF FACTS**

Bob Morrill was an employee with the Texas Department of Corrections institutional division. He was assigned to the Garza West facility in Beeville, Texas. (RR. XVIII, p-90). His title was that of a Diagnostic Administrative Technician III, but was commonly known as an Intake Interviewer. (RR. XVIII, p-92). Since his employment in 1994 he would engage in

\* \* \*

CAUSE NO. 97-CR-1717D-W1  
IN THE TEXAS COURT OF CRIMINAL APPEALS  
AND

IN THE DISTRICT COURT OF  
BEXAR COUNTY, TEXAS  
290TH JUDICIAL DISTRICT

---

EX PARTE CARLOS TREVINO,

*Applicant*

---

DEATH PENALTY CASE  
APPLICATION FOR POST-CONVICTION WRIT  
OF HABEAS CORPUS AND BRIEF IN SUPPORT

---

\* \* \*

**CLAIM XXXI**

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE GUILT/INNOCENSE AND PUNISHMENT PHASE, IN VIOLATION OF ARTICLE I, §10 OF THE TEXAS CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.

**CLAIM XXXII**

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE GUILT/INNOCENSE AND PUNISHMENT PHASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION,

**BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.**

**STATEMENT OF FACTS CONCERNING  
CLAIMS XXXI, XXXII**

After an alternate juror was seated the State advised defense counsel that DNA analysis would be used against Applicant and that the results, which did not exclude Applicant as a blood donor, would incriminate him. (R-v.15-33, 34). Defense counsel asked for a mistrial after being denied the opportunity to voir dire on DNA. (R-v.15-33). Defense counsel agreed to the appointment of an independent expert to analyze the DNA and report back while the trial was in progress (R-v.15-38). Defense counsel by his own admission, was unable to properly prepare Applicant's defense, and he therefore alleged ineffective assistance of counsel in a Motion for a New Trial (T supp.-4).

**ARGUMENT AND AUTHORITIES IN SUPPORT  
OF CLAIMS XXXI, XXXII**

The right to effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Applicant is also entitled to effective assistance of counsel under Article I, §10 of the Texas Constitution. Applicant was denied effective assistance under both standards.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) the United States Supreme Court formulated a two prong test for determining whether reversal is required for ineffective assistance:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction.... resulted from a breakdown in adversary process that renders the result unreliable.

*Id.* At 687. Furthermore, such showings must be made "in light of all the circumstances..." *Id.* at 690. In *Gallegos v. State*, 756 S.W. 2d 45 (Tex. App.—San Antonio 1988, *reh. den.*), the appellate court formulated a two prong test for determining effective assistance of counsel at the punishment phase of trial in an application of the *Strickland* standard. This test requires that the Applicant:

- 1.) Identify the acts or omissions he alleges are deficient on the part of his attorney and demonstrate that they are not the result of reasonable professional judgment, and;
  - 2.) Establish that the acts or omissions so prejudiced him that he was denied a fair trial.
- Id.* at 47.

Applicant, due to omissions by defense counsel, was denied the proper tools to construct a defense. While defense counsel agreed to appointment of an expert, the trial was already underway (R-v.15-38). Indigent defendants are entitled to independent experts when their assistance "may well be crucial to the defendant's

ability to marshal a defense.” *Ake v. Oklahoma*, 470 U.S. 68, 71 (1985). In *Ake*, The United States Supreme Court conducted a Fourteenth Amendment due-process analysis, and held that without independent experts defendants could be denied “meaningful access to justice.” *Id.* at 76-77. While jurors may disregard a defendant’s testimony or a lawyer’s argument, experts “assist lay jurors, who generally have no training in ‘scientific or medical matters,’ to make a sensible and educated determination about the contested issues.” *Id.*, 470 U.S. at 81. See also *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th. Cir.) (en banc), *cert. den.* 499 U.S. 970 (1991); *Smith v. McCormick* 914 F.2d 1153 (9th. Cir. 1990); *Blake v. Kemp*, 758 F.2d. 523 (11th Cir.), *cert., denied*, 474 U.S. 998 (1985).

Applicant was also denied the right to fair rebuttal. A capital defendant must be given a fair opportunity to meet, rebut or explain any evidence which the state offers as a reason the defendant should be put to death. *Gardner v. Florida*, 430 U.S. 349 (1977). Although defense counsel urged an *Ake* motion and a Motion for Continuance to prepare a defense to the incriminating DNA evidence, he was denied that opportunity. Had the trial court allowed adequate time to prepare a proper defense, the DNA would not have had such a serious impact on the jury. The evidence was used by the State in seeking a finding of guilty. (R-v.22-98, 107, 143).

By defense counsel’s own admission he provided ineffective assistance. In the Motion for New Trial defense counsel alleged: “Consequently, Defendant was denied effective assistance of counsel because he was forced to proceed to trial without adequate preparation to cross examine the state’s expert witness (sic) on his



DNA testing procedure and the results of his DNA testing." (T supp.-4). Counsel filed a Motion for Continuance on June 18, 1997, and the trial court denied it on June 18, 1997. (T-2-133, 36). Defense did urge a Motion for a Mistrial and it, too, was denied. (R-v.15-35).

On July 16, 1997, Applicant's, court appointed investigator, Edward C. Villanueva, conducted interviews of jurors (see Exhibit "B"). Mr. Villanueva, in his report and his affidavit (see Exhibit "C"), stated that the juror's opinion of the condemning evidence was the blood, DNA and fiber evidence, coupled with Juan Gonzales' testimony. The jurors believed most of what Gonzales said. It must be concluded that this improperly admitted evidence only served to further prejudice Applicant.

Prejudice is presumed from an inherent conflict when Defendant files a Motion for New Trial claiming ineffective assistance and the court does to appoint substitute counsel. *United States v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996). In Applicant's case a post-trial hearing should have been held where trial counsel would have to prove his own ineffectiveness.

### **CLAIM XXXIII**

**APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE GUILT/INNOCENSE AND PUNISHMENT PHASE, IN VIOLATION OF ARTICLE I, §10 OF THE TEXAS CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.**



**CLAIM XXXIV**

**APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE GUILT/INNOCENCE AND PUNISHMENT PHASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.**

**STATEMENT OF FACTS CONCERNING  
CLAIMS XXXIII, XXXIV**

Defense Counsel failed to object to a successful State challenge for cause on prospective juror Michael Joseph Conlan.

Mr. Conlan was questioned at length by the State concerning his apparent uncomfortable feelings about the death penalty. (R-v.-419-58). The state went to great lengths to make Mr. Conlan say that he could not follow the law and consider the death penalty. Defense counsel thereafter questioned Mr. Conlan:

*Mr. Wilcox:*

- Q. Okay, now, I guess the question that I need to ask you: Are you so opposed in your beliefs to the infliction of the punishment of death as a punishment for crime, so unbending, that in any situation, no matter what the evidence may show, what—and if you would automatically, unequivocally disregard the law and, “I’m not going to”?
- A. No. What you’re asking me to do then is basically lie.

Q. Very good. You're right. You won't lie, will you?

A. No. (R-v.4-29).

The Court: I thought when you answered the State's question that you said that you did not think that you could fairly answer question number three based on the evidence because you knew that the result would be a death sentence. And then you told Mr. Wilcox, "Well, of course, I couldn't lie. I would have to answer the questions fairly, based on what the evidence told me, even though the death penalty might result."

Juror: Yeah

The Court: .....

Okay. Well, I'm going to deny your challenge.

Ms. Herr: Okay.

(R-v.4-32-33).

The state redirected their efforts in challenging Mr. Conlan by questioning him on reasonable doubt. (R-v.4-41-45). After some questioning the State challenged Mr. Conlan for cause (R-v.4-47). The Court then explained the definition of reasonable doubt to the juror. (R-v.4-47-50). After further discussion, with some apparent confusion on the part of Mr. Conlan, the state re-urged their challenge for cause, claiming, "We would just like to re-urge our challenge for cause, your Honor. He wants proof beyond all possible doubt and that's more than what is required." (R-v.4-54). Defense counsel questioned Mr. Conlan:

*Mr. Wilcox:*

Q. Mr. Conlan, we understand that you have to be sure in your own mind. Okay? That's a given,

can you understand that to be a process of reasonable doubt in a convincing process? If they bring you evidence that makes you comfortable, that makes you sure in your own mind that the person committed the offense, haven't they demonstrated to you proof beyond a reasonable doubt that would make your decision?

Juror: That's what I've been saying. He said if I believe.

*The Court: If you believe beyond a reasonable doubt, then you could find the person guilty?*

Juror: Yes. If I believe it, yes. That's what I've been saying, your Honor. I'm fine with that.

*The Court: I know. (emphasis added). (R-v.4-55).*

After Mr. Conlan affirmatively stated that he could follow the law, Defense Counsel continued with unnecessary questioning which again initiated questioning by the Court, only serving to confuse the juror. (R-v.4-56-57).

The Court: you have been saying that. But what you haven't been saying, apparently, is that you'll follow the standard of proof that the law requires in a criminal case, which is less than absolute certainty. Because there's just not anything of which you can be absolutely certain unless you saw it yourself, And if you can't do that, that's fine, too. *Just tell me. You're out of here. (emphasis added).*

Juror: Your Honor, I'm just saying in my own mind, I've got to be sure.

The Court: I know that. Will you use this standard of proof that the law requires? Are you

going to require something more? And the law says beyond a reasonable doubt. You want more than that, that's fine.

Juror: Damn

The Court: If you do, that's okay. Just tell me. After all, you've got a death penalty looming out there possibly.

Juror: Then I wouldn't be happy. I want to be sure. I've got to be sure. No doubts in my mind.

The Court: All right. I'm going to grant the Prosecutor's challenge. (R-v.4-57).

There was no objection from defense counsel to the court's ruling.

### **ARGUMENT AND AUTHORITIES IN SUPPORT OF CLAIMS XXXIII, XXXIV**

The right to effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Applicant is also entitled to effective assistance of counsel under Article I, §10 of the Texas Constitution. Applicant was denied effective assistance under both standards.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) the United States Supreme Court formulated a two prong test for determining whether reversal is required for ineffective assistance:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance

prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction.... resulted from a breakdown in adversary process that renders the result unreliable.

*Id.* At 687. Furthermore, such showings must be made "in light of all the circumstances..." *Id.* at 690. In *Gallegos v. State*, 756 S.W. 2d 45 (Tex. App.—San Antonio 1988, *reh. den.*), the appellate court formulated a two prong test for determining effective assistance of counsel at the punishment phase of trial in an application of the *Strickland* standard. This test requires that the Applicant:

- 1.) Identify the acts or omissions he alleges are deficient on the part of his attorney and demonstrate that they are not the result of reasonable professional judgment, and;

- 2.) Establish that the acts or omissions so prejudiced him that he was denied a fair trial. *Id.* at 47.

A failure to object to a ruling at the time it is made waives error pursuant to Tex.R.App.P.33.1. The record is devoid of any objection by counsel when the Court granted the State's challenge for cause. Although Mr. Conlan was disqualified, supposedly because of a "reasonable doubt issue," a reading of the record clearly shows that the State was attempting to disqualify him on his views of the death penalty (R-v.4-19). A sentence of death cannot be imposed or recommended if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or ex-



pressed conscientious or religious scruples against its infliction. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Mr. Conlan testified that he was not opposed in his beliefs to the infliction of death. (R-v.4-29). Applicant raises this point because if the trial court erroneously sustained the State's challenge for cause on a specific ground and the record shows with unmistakable clarity that the juror was subject to a challenge for cause on a different ground that was discussed or not raised, the error is harmless. *Ransom v. State*, No. 71,633, unpublished slip op. at 4-5 (Tex.Crim.App. June 15, 1994). To preserve the erroneous disqualification of a juror who was challenged for cause by the state, defense counsel must object to the challenge, *Hovilla v. State*, 562 S.W.2d 243, 247 (Tex.Crim.App. 1978), before the juror is discharged. *Barefield v. State*, 784 S.W. 2d 38 (Tex.Crim.App. 1989). A specific objection is not required if the basis for the state's challenge for cause was obvious to the trial judge and the prosecutor, but it is safer to make one. *See and compare Nichols v. State*, 754 S.W.2d 185, 192-93, 612 (Tex.Crim.App. 1984). *Holloway v. State*, 691 S.W.2d 608, 612 (Tex.Crim.App. 1984). The error cannot be deemed harmless because of the state's failure to use all of its peremptory strikes. *Richardson v. State*, 744 S.W. 2d 65, 69-79 & no.3 (Tex.Crim.App. 1987).

Applicant was denied effective assistance of counsel under the State and U.S. Constitution because his trial counsel was deficient in failing to object to the exclusion of Mr. Conlan. The outcome of the trial would probably have been different if Mr. Conlan would have sat on the jury.



*CLAIM XXXV*

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE GUILT/INNOCENSE PHASE, IN VIOLATION OF ARTICLE I, §10 OF THE TEXAS CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.

*CLAIM XXXVI*

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE GUILT/INNOCENSE PHASE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.

*CLAIM XXXVII*

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE GUILT/INNOCENSE PHASE, IN VIOLATION OF ARTICLE I, §10 OF THE TEXAS CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.

*CLAIM XXXVIII*

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE GUILT/INNOCENSE PHASE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMEND-

**MENTS TO THE UNITED STATES CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.**

**STATEMENT OF FACTS CONCERNING  
CLAIMS XXV, XXXVI, XXXVII, XXXVIII**

In claims XXXV and XXXVI, Applicant asserts that his counsel was ineffective at the guilt/innocence phase in failing to object to testimony from Juan Gonzales that Santos Cervantes said something about being cool about snapping the deceased's neck, which statement was made after they drove away from the scene. Applicant alleges that counsel was ineffective under standards of the Texas Constitution as well as the Sixth and Fourteenth Amendment to the United States Constitution.

In claims XXXVII and XXXVIII, Applicant asserts that his counsel was ineffective at the guilt/innocence stage in failing to object to testimony from Juan Gonzales that Applicant replied to Santos Cervantes that he "learned to kill," which statement was made after they drove away from the crime scene. Counsel was ineffective under the State and the United States Constitution.

Applicant relies on the Statement of Facts in Claims VII, VIII, IX, AND X.

At the guilt/innocence phase of the trial, witness Juan Gonzales testified that he heard Apolinar state after the sexual assault, "we don't need no witnesses." Applicant replied, "We'll do what we have to do." (R-v.18-190, 191). Cervantes said it was cool how he snapped her neck and, "That was cool how you used a

knife." Applicant responded, "I learned how to kill." (R-v.19-5). At an earlier hearing defense counsel objected to the phrase, "I learned how to kill in prison." (R-v.18-153). Juan Gonzales was then instructed to testify only that Applicant said, "I learned how to kill." (R-v.18-153). Defense Counsel failed to object to the hearsay testimony at the hearing (R-v.18-137), or on direct examination of Gonzales (R-v.19-5).

### **ARGUMENTS AND AUTHORITIES IN SUPPORT OF CLAIMS XXXV, XXXVI, XXXVII, XXXVIII**

The right to effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Applicant is also entitled to effective assistance of counsel under Article I, §10 of the Texas Constitution. Applicant was denied effective assistance under both standards.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) the United States Supreme Court formulated a two prong test for determining whether reversal is required for ineffective assistance:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the con-

viction.... resulted from a breakdown in adversary process that renders the result unreliable.

*Id.* At 687. Furthermore, such showings must be made "in light of all the circumstances..." *Id.* at 690. In *Gallegos v. State*, 756 S.W. 2d 45 (Tex. App—San Antonio 1988, *reh. den.*), the appellate court formulated a two prong test for determining effective assistance of counsel at the punishment phase of trial in an application of the Strickland standard. This test requires that the Applicant:

- 1.) Identify the acts or omissions he alleges are deficient on the part of his attorney and demonstrate that they are not the result of reasonable professional judgment, and;
  - 2.) Establish that the acts or omissions so prejudiced him that he was denied a fair trial.
- Id.* at 47.

A failure to object to the testimony at the time of trial waives the complained of error. Tex.R.App.P.33.1. Even the State, in its reply brief on direct appeal, contends that defense counsel's failure to object did not preserve error. (State's reply brief on direct appeal, p.22 [State's Response To Appellant's Fourth Point of Error]).

Counsel was no longer acting as counsel contemplated in *Strickland*. Applicant was prejudiced by the inadmissible testimony and suffered harm. Edward C. Villanueva, court appointed investigator for Applicant, in his report and Affidavit (Exhibits B & C) interviewed jurors and determined that they considered the testimony of Juan Gonzales as condemning.

*CLAIM XXXIX*

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE PUNISHMENT PHASE, IN VIOLATION OF ARTICLE I, §10 OF THE TEXAS CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.

*CLAIM XXXX*

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE PUNISHMENT PHASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.

*CLAIM XXXXI*

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE PUNISHMENT PHASE, IN VIOLATION OF ARTICLE I, §10 OF THE TEXAS CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.

*CLAIM XXXXII*

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE PUNISHMENT PHASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH



**AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.**

**STATEMENT OF FACTS CONCERNING CLAIMS XXXIX, XXX, XXXXI, XXXXII**

In claims XXXIX and XXXX, Applicant asserts that his counsel was ineffective at the punishment stage in failing to object to testimony from Juan Gonzales that Santos Cervantes said something about being cool about snapping the deceased's neck, which statement was made after they drove away from the scene. Counsel was ineffective under the Texas Constitution, Art 1 § 10, as well as the Sixth and Fourteenth Amendments of the United States Constitution.

In claims XXXXI and XXXXII, Applicant claims that his counsel was ineffective at the punishment stage because he failed to object to testimony from Juan Gonzales that Applicant replied to Santos Cervantes that he "learned to kill in prison (R-v.23-83, 84), which statement was made after they drove away from the scene. Counsel was ineffective under standards of the Texas Constitution, Art. 1 §10, as well as the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Applicant relies on the Statement of Facts as contained in claims VII, VIII, IX, AND X.

At the punishment phase of the trial Juan Gonzales testified as follows:

*By Ms. Herr:*

Q. All right. Was there a conversation between the other occupants of the car?



A. Yes, Ma'am.

Q. All right. Could you tell the jury, please, what was said and who said it?

A. That it was cool about—Santos said it was neat about Carlos snapping her neck.

Q. All right. And in response to that, what did Carlos say?

A. "I learned how to kill in prison."

Q. All right. What else did he say about his ability to use a knife?

A. That "I learned how to use a knife in prison, too."

(R-v.23-83, 84)

There was no objection by defense counsel to this testimony on direct examination, or at a prior hearing on the matter (R-v.18-137).

### **ARGUMENT AND AUTHORITIES IN SUPPORT OF CLAIMS XXXIX, XXXX, XXXXI, XXXXII**

The right to effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Applicant is also entitled to effective assistance of counsel under Article I, §10 of the Texas Constitution. Applicant was denied effective assistance under both standards.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) the United States Supreme Court formulated a two prong test for determining whether reversal is required for ineffective assistance:

First, the defendant must show that counsel's performance was deficient. This requires

showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction.... resulted from a breakdown in adversary process that renders the result unreliable.

*Id.* At 687. Furthermore, such showings must be made "in light of all the circumstances..." *Id.* at 690. In *Gallegos v. State*, 756 S.W. 2d 45 (Tex. App.—San Antonio 1988, *reh. den.*), the appellate court formulated a two prong test for determining effective assistance of counsel at the punishment phase of trial in an application of the *Strickland* standard. This test requires that the Applicant:

- 1.) Identify the acts or omissions he alleges are deficient on the part of his attorney and demonstrate that they are not the result of reasonable professional judgment, and;
- 2.) Establish that the acts or omissions so prejudiced him that he was denied a fair trial. *Id.* at 47.

A failure to object to the testimony at the time of trial waives the complained of error. Tex.R.App.P33.1. Even the State, in its reply brief on direct appeal, contends that defense counsel's failure to object did not preserve error. (State's reply brief on direct appeal, p.22 [State's Response To Appellant's Brief]).

Counsel was no longer acting as counsel contemplated in *Strickland* and *Gallegos*. Applicant was

prejudiced by the inadmissible testimony and suffered harm. Edward C. Villanueva, court appointed investigator for Applicant, in his report and affidavit (Exhibits B & C) interviewed jurors and determined that they considered the testimony of Juan Gonzales as condemning.

#### ***CLAIM XXXXIII***

**APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF THE PUNISHMENT PHASE, IN VIOLATION OF ARTICLE 1 §10 OF THE TEXAS CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.**

#### ***CLAIM XXXXIV***

**APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE PUNISHMENT PHASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.**

#### **STATEMENT OF FACTS CONCERNING CLAIMS XXXXIII, XXXXIV**

At the punishment phase Bob Morrill, Diagnostic Administrative Technician with the Texas Department of Criminal Justice, Institutional Division, testified regarding Applicant's gang affiliation and the rules for La Hermanidad y Pistoleros Latinos. (R-v.23-92). Based on Applicant's pen packet for a 1993 conviction for Unauthorized Use of a Motor Vehicle, Morrill determined

that Applicant had been designated a gang member of La Hermanidad y Pistoleros Latinos. (R-v.23-97-99). Morrill's testimony was also based on Applicant's tattoos. Morrill did admit that he was not privileged to other information maintained by the Texas Department of Criminal Justice that would be a necessary part of the three-step process to document gang members. (R-v.23-100).

Witness Morrill produced documents he described as the rules of La Hermanidad y Pistoleros Latinos (R-v.23-104-07). Morrill could not say where the documents came from, and Applicant's counsel objected but was overruled (R-v.23-108-09). Morrill could give no personal information about Applicant or his alleged gang activities.

Defense counsel failed to object regarding the testimony of gang membership, gang rules and linking Applicant to the La Hermanidad y Pistoleros Latinos (R-v.23-90-98). Defense counsel did object once, but it was only for Morrill's "characterization and his reflections," when Morrill said that, "For the security of the other inmates there, most of the gang members are predators. Just like they are out on the street. I don't know. People think everybody is locked away in a cell, that's not true." (R-v.23-98).

Mr. Morrill was shown tattoo photos of Applicant, State's Exhibits 92, 93, 94. (R-v.23-100). They were tendered to counsel, and defense counsel said he had no objections, whereupon 92, 93, and 94 were admitted into evidence. Thereafter Mr. Morrill testified that Applicant's tattoos were from La Hermanidad y Pistoleros Latinos. (R-v.23-104).

## ARGUMENT AND AUTHORITIES IN SUPPORT OF CLAIMS XXXXIII, XXXXIV

The right to effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Applicant is also entitled to effective assistance of counsel under Article I, §10 of the Texas Constitution. Applicant was denied effective assistance under both standards.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) the United States Supreme Court formulated a two prong test for determining whether reversal is required for ineffective assistance:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction.... resulted from a breakdown in adversary process that renders the result unreliable.

*Id.* At 687. Furthermore, such showings must be made "in light of all the circumstances...." *Id.* at 690. In *Gallegos v. State*, 756 S.W. 2d 45 (Tex. App.—San Antonio 1988, *reh. den.*), the appellate court formulated a two prong test for determining effective assistance of counsel at the punishment phase of trial in an application of the *Strickland* standard. This test requires that the Applicant:



- 1.) Identify the acts or omissions he alleges are deficient on the part of his attorney and demonstrate that they are not the result of reasonable professional judgment, and;
- 2.) Establish that the acts or omissions so prejudiced him that he was denied a fair trial.  
*Id* at 47.

Defense counsel failed to object to the hearsay testimony of Bob Morrill or his linking Applicant to La Hermanidad y Pistoleros Latinos, the rules of the gang, and the tattoos. A failure to object at the time of trial fails to preserve error for appeal purposes. Tex.R.App.P.33.1. Defense counsel did object to State's Exhibit No. 103, the rules and regulations of La Hermanidad y Pistoleros Latinos, but the objection was improper as it was based on the State's failure to lay a proper predicate (R-v.23-107). When the State reoffered the evidence defense counsel again objected based on improper predicate. A failure to properly object concedes the relevancy of the offered evidence. *Turner v. State*, 698 S.W.2d 673 (Tex.Crim.App. 1985).

Clearly, defense counsel was no longer acting as counsel contemplated by *Strickland* or *Gallegos* in representing Applicant. Applicant suffered harm because the jury was allowed to hear inadmissible testimony. It can not be disputed that they relied on this testimony in sentencing Applicant to death.



**CLAIM XXXXV**

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE GUILT/INNOCENSE AND PUNISHMENT PHASE, IN VIOLATION OF ARTICLE I, §10 OF THE TEXAS CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.

**CLAIM XXXXVI**

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AT THE GUILT/INNOCENSE AND PUNISHMENT PHASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY, AND BECAUSE THAT DEFICIENT PERFORMANCE PREJUDICED APPLICANT.

**STATEMENT OF FACTS CONCERNING  
CLAIMS XXXXV, XXXXVI**

At the guilt/innocense phase the trial court submitted a jury charge to the jury that authorized a conviction on a theory not alleged in the indictment:

"...10TH day of JUNE, A.D., 1996, ROBERT CARLOS TREVINO, hereinafter referred to as defendant, did then and there intentionally and knowingly cause the death of an individual, namely: LINDA SALINAS, hereinafter referred to as complainant, BY CUTTING AND STABBING the said complainant WITH A DEADLY WEAPON; NAMELY: A KNIFE, THAT IN THE MANNER OF ITS USE AND INTENDED

USE WAS CAPABLE OF CAUSING DEATH AND SERIOUS BODILY INJURY; and the said defendant did then and there intentionally cause the death of the said LINDA SALINAS, while the defendant was in the course of committing and attempting to commit AGGRAVATED SEXUAL ASSAULT upon the said LINDA SALINAS;..." (T-v.1-2) .

The jury charge at VI, read as follows:

" .....

#### VI.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 10th day of June A.D., 1996 in Bexar County, Texas, the defendant, Carlos Trevino, did intentionally or knowingly cause the death of an individual, namely: Linda Salinas, by cutting or stabbing Linda Salinas with a deadly weapon, namely: a knife, that in the manner of its use or intended use was capable of causing death or serious bodily injury, and the defendant did intentionally cause the death of Linda Salinas while in the course of committing or attempting to commit the offense of aggravated sexual assault upon Linda Salinas, or

If you find from the evidence beyond a reasonable doubt that on or about the 10th day—of June A.D 1996 in Bexar County, Texas, the defendant, Carlos Trevino, acting together with any or all of the following: Bryan Apolinar, Santos Cervantes, Sienido Sam Rey or Juan Gonzales, did intentionally or knowingly cause the death of an individual, namely: Linda Salinas, by cutting or stabbing Linda Salinas with a deadly weapon, namely: a knife, that in the manner of its use or intended use was capable of causing death or serious bodily injury, and the defendant did intentionally cause the

death of Linda Salinas while in the course of committing or attempting to commit the offense of aggravated sexual assault upon Linda Salinas; or

If you find from the evidence beyond a reasonable doubt that on or about the 10th day of June A.D., 1996 in Bexar County, Texas, the defendant, Carlos Trevino, and any or all of the following: Bryan Apolinar, Santos Cervantes, Sienido Sam Rey or Juan Gonzales, entered into a conspiracy to commit Aggravated Sexual Assault on Linda Salinas and that pursuant thereto they did carry out, or attempt to carry out. (emphasis added), and that on or about the 10th day of June, A.D., 1996, in Bexar County, Texas, in the course of committing or attempting to commit Aggravated Sexual Assault on Linda Salinas, Bryan Apolinar, Santos Cervantes, Sienido Sam Rey or Juan Gonzales intentionally or knowingly did cause the death of an individual, namely: Linda Salinas by cutting or stabbing Linda Salinas with a deadly weapon, namely a knife, that in the manner of its use or intended use was capable of causing death or serious bodily injury, and that Bryan Apolinar, Santos Cervantes, Sienido Sam Rey or Juan Gonzales did intentionally cause the death of Linda Salinas while in the course of committing or attempting to commit the offense of Aggravated Sexual Assault upon Linda Salinas, and that said offense was committed in furtherance of the conspiracy to commit Aggravated sexual Assault of Linda Salinas and should have been anticipated by the defendant Carlos Trevino as a result of the carrying out of the conspiracy (emphasis added), then you will find the defendant guilty of capital murder.

If you do not so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the

defendant not guilty of capital murder and next consider whether the defendant is guilty of murder."

(T-v.2-152-154).

Defense Counsel objected to the conspiracy portion of the charge because its inclusion would necessitate the Court charging criminal conspiracy 15.02. (R-v.20-8). Applicant alleges error based on claims for relief. Although no objection was lodged in this respect, none is needed *Almanza v. State*, 686 S.W.2d 157, 170 (Tex.Crim.App. 1985).

### **ARGUMENT AND AUTHORITIES IN SUPPORT OP CLAIMS XXXXV, XXXXVI**

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) the United States Supreme Court formulated a two prong test for determining whether reversal is required for ineffective assistance:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction.... resulted from a breakdown in adversary process that renders the result unreliable.

*Id.* At 687. Furthermore, such showings must be made "in light of all the circumstances..." *Id.* at 690. In *Gallegos v. State*, 756 S.W. 2d 45 (Tex. App—San Anto-

nio 1988:, *reh. den.*), the appellate court formulated a two prong test for determining effective assistance of counsel at the punishment phase of trial in an application of the *Strickland* standard. This test requires that the Applicant:

- 1.) Identify the acts or omissions he alleges are deficient on the part of his attorney and demonstrate that they are not the result of reasonable professional judgment, and;
  - 2.) Establish that the acts or omissions so prejudiced him that he was denied a fair trial.
- Id.* at 47.

Except in the case of fundamental error, failure to object waives all error. Tex.R.App.P.33.1. Counsel made an improper objection (R-v.20-8), when the objection should have been that the trial court submitted a charge that authorized a conviction on a theory in the indictment and on one or more theories not pled. Such charge would permit conviction on the conspiracy theory, something that is fundamentally defective. *Cumbie v. State*, 578 S.W.2d 732, 733 (Tex.Crim.App. 1979); *Gonzales v. State*, 578 S.W.2d 736, 737 (Tex.Crim.App. 1979); *Smith v. State*, 603 S.W.2d 846 (Tex.Crim.App. 1980) *reh. den.* 1980); *West v. State*, 567 S.W. 2d 515 (Tex.Crim.App. 1978).

Applicant's U.S. Constitutional rights to effective assistance of counsel were also violated by the above deficient performance of defense counsel. *Cupp v. Naughton*, 414 U.S. 141 (1973); *Boyde v. California*, 494 U.S. 370 (1990); *Stromberg v. California*, 283 U.S. 359 (1931). Applicant was denied his rights under the Sixth, Fourteenth, and Eighth Amendment to the United States Constitution when the trial court instructed the jury as follows:



The Court: "Members of the jury, by your verdict returned in this case, you have found the defendant, Carlos Trevino, guilty of capital murder, which was alleged to have been committed on or about the 10th of June, 1996, in Bexar County, Texas. *It is necessary now for you to determine from all evidence in the case answers to certain questions called special issues in these instructions.*" (emphasis added). (R-v.24-3). The State in summation, asked the jury to sentence Applicant, "According to the law *and according to the evidence that has been presented to you in this case.*" (R-v.24-11) (emphasis added). The State further emphasized evidence from the guilt/innocence phase throughout summation and asked the jury to consider it. (R-v.24-40-45).

Applicant alleges that defense counsel's deficient performance prejudiced him, and but for that deficient performance, the outcome of the trial would have been different. It is apparent that the jury was urged to consider the conspiracy theory, something they obviously did.

\* \* \*



**EXHIBIT B**

[letterhead omitted]

July 17, 1997

Mario A. Trevino  
315 S. Main Street  
San Antonio, Texas 78204

Re: Robert Trevino

Mario,

On Wednesday, July 16, 1997, I interviewed Debra Duke, Herbert Littleton and Mark Pritchett. None of them indicated that any juror had voiced any personal opinions about Robert Trevino, nor of his guilt or innocence before they deliberated; nor were there any discussions heard about hearing news articles on TV, radio or newspaper; there were no outside discussions about of his arrest status; no one said they would be bound by a majority poll; no one mentioned that they had visited the crime scene; Herbert Littleton said there was a juror that took notes and that juror did refer to his notes when they got to talking about an issue raised in the jury room, however, Littleton said the juror did not give the notes to anyone to read, the juror just gave his opinion based on what he had written in his notes. No one voiced their personal knowledge of Robert Trevino, nor were there any comments of any racial biases. No conversations of prior convictions before deliberating on guilt or innocence, nor were there any discussions of another jury hearing the case if they did not come to a decision themselves. They all indicated that they understood the blood, DNA and fiber evidence. Their opinion of the condemning evidence was the blood, DNA and fiber evidence, coupled with Juan Gonzales'

testimony; the jurors believed most of what Gonzales said.

Karen Anstee and Sandra Copeland did not want to answer questions. The other jurors were left message to contact me at the Attorney's office on July 17, 1997. Four hours were spent on contacting and attempting to contact these jurors.

Edward C. Villanueva

## EXHIBIT C

## AFFIDAVIT

STATE OF TEXAS \*

COUNTY OF BEXAR \*

On this date appeared Edward C. Villanueva, Detect Investigation Company, who stated the following under oath.

"My name is Edward C. Villanueva and I am a private investigator. I was court appointed to conduct investigation in the case of the State of Texas v. (Robert) Carlos Trevino, No. 97-CR-1717D. On or about July 16, 1997, I interviewed jurors at the request of Mr. Mario A. Trevino, court appointed counsel for Carlos Trevino.

In speaking with jurors I found that in their opinion the evidence which was most damaging was the blood, DNA and fiber evidence, coupled with Juan Gonzales' testimony. The jurors believed most of what Gonzales said."

/s/ Edward C. Villanueva  
Edward C. Villanueva

SWORN AND SUBSCRIBED to before me on the  
[handwritten/initialed correction: 12th] day of April,  
1999.

/s/ Albert L. Rodriguez  
Notary Public, State of Texas

[STAMP:

ALBERT L. RODRIGUEZ  
Notary Public, State of Texas  
STATE OF TEXAS  
My Commission Exp. 06/01/02]

[1]

## REPORTER'S RECORD

VOLUME 1 OF 1 VOLUMES

TRIAL COURT CAUSE NO. 97-CR-1717D-W1

|                    |   |                         |
|--------------------|---|-------------------------|
| THE STATE OF TEXAS | ) | IN THE DISTRICT COURT   |
| VS.                | ) | 290TH JUDICIAL DISTRICT |
| CARLOS TREVINO     | ) | BEXAR COUNTY, TEXAS     |

**WRIT HEARING**

**JULY 10, 2000**

On the 10TH of JULY, 2000, the proceedings came to be heard outside the presence of a jury, in the above-entitled and numbered cause; and the following proceedings were had before the HONORABLE SHARON MACRAE, Judge presiding, held in San Antonio, Bexar County, Texas:

Proceedings reported by computerized stenotype machine; Reporter's Record produced by computer-assisted transcription.

**HOLLY DIETERT, CSR NO. 2559**  
**Official Court Reporter, 290th District Court**  
**Bexar County Justice Center, 300 Dolorosa**  
**San Antonio, Texas 78205**  
**(210) 335-2696**

[2]

**\* \* \* APPEARANCES \* \* \***

**BEXAR COUNTY DISTRICT ATTORNEY'S OFFICE BY:**

MR. ED SHAUGHNESSY  
 MS. MARY BETH WELSH  
 Bexar County Justice Center, 300 Dolorosa  
 San Antonio, Texas 78205  
 Appearing for the State of Texas;

LAW OFFICES OF ALBERT L. RODRIGUEZ BY:

ALBERT L. RODRIGUEZ  
 1919 San Pedro  
 San Antonio, Texas 78212  
 Appearing for the Defendant.

\* -- \* -- \* -- \* -- \* -- \* -- \*

[3]

# PROCEEDINGS

THE COURT: 97-CR 1717D-W1, ex parte Carlos Trevino. It's a writ of habeas corpus. Now, aside from Mr. Mario Trevino, who you've called as a witness, did you need to—the Court to address specifically any of these other matters or—

MR. RODRIGUEZ: I think we had previously agreed, Your Honor, in the order that we signed about the claims for relief—

MR. SHAUGHNESSY: Does the Court have the writ file, Your Honor, the red one?

THE COURT: Yeah.

MR. SHAUGHNESSY: There should be an order of May 11th, '99, designating the issues as—

THE COURT: I don't have that, of course.

MR. SHAUGHNESSY: Well, I've got a copy you can use.

THE COURT: Why would I have the order that I signed on this thing? That would be too much to ask. Okay.

MR. SHAUGHNESSY: Essentially, it's my understanding that the claims that we're having evidentiary hearing on are 31 through 36, which are the allegations of ineffective assistance of counsel.

MR. RODRIGUEZ: No, I the ineffective goes all the way up to 46; don't they?

[4]

MR. SHAUGHNESSY: Forty-six. I don't know why they haven't gotten rid of those Roman numerals.

THE COURT: The Roman numerals say 36.

MR. SHAUGHNESSY: No, they don't, they say 46. I'm just getting too far or near or blind sighted.

THE COURT: That's not how you write 40 in Roman numerals. Oh, well, it's your order. I wrote it wrong. It's 46. Your witness is here, I believe.

MR. SHAUGHNESSY: Yes, Your Honor. Before we start, the State would ask the Court to take judicial notice of all the pleadings and testimony adduced previously in the case of the State of Texas vs. Carlos Trevino in Cause No. 97-CR-1717D.

THE COURT: Okay. I will.

MR. SHAUGHNESSY: And one other preliminary matter before the Court begins the evidentiary portion. I don't know what the Court views it as, but attached to the writ of habeas corpus, is an affidavit from an individual by the name of Edward C. Villanueva and a letter from Edward C. Villanueva as exhibits B and C. The State would object to the Court



considering those matters on the basis that they constitute hearsay at the present time. They may become admissible at a later time, but at the present time I believe they constitute hearsay, and the State would object to their admission.

[5]

THE COURT: Well, as far as I'm concerned, they're not evidence.

MR. SHAUGHNESSY: Well, I just wanted to make sure that there's no dispute before we start as to whether they are evidence or not.

THE COURT: No. They're not.

MR. SHAUGHNESSY: Okay. That's all the State would have. Thank you.

THE COURT: Okay.

MR. SHAUGHNESSY: State would invoke the rule at this time also, Your Honor, in case there's any need for it. I don't know.

THE COURT: All right. How many witnesses do we have in the courtroom on this writ on Mr. Trevino?

MR. RODRIGUEZ: One, Your Honor.

THE COURT: All right. We have just one. Do you want to call the witness?

MR. RODRIGUEZ: Mario Trevino.

[6]

MARIO TREVINO

the witness, being duly sworn, testified as follows:

DIRECT EXAMINATIONBY MR. RODRIGUEZ:

Q. Mr. Trevino, please state your full name for the record.

A. My name is Mario Trevino.

Q. And what is your profession?

A. I'm an attorney in private practice.

Q. All right. And you were the trial counsel for Mr. Carlos Trevino?

A. Yes.

Q. Okay. I'm going to discuss some claims for relief that I have filed in my writ. The first one I want to bring your attention to was a motion for new trial that you filed at the conclusion of this trial. Do you recall that, sir?

A. Yes, I do.

Q. Okay. And what did you allege in that motion?

A. Well, I alleged ineffective assistance of counsel, because I was precluded, I think, primarily from voir dire'g the jury on their opinions or their views of DNA evidence.

Q. Okay. And why did you feel this voir dire to the jury on DNA was necessary?

A. Well, it certainly developed into—DNA evidence, of course, is considered very probative by most jurors. And it [7] would have been nice to explore whether they would be able to consider, you know, the possibility of error on the part of, you know, DNA results. Really, just to find out what their views are. Well, there's DNA evidence and that's it. It's done.

He's guilty of capital murder versus whether they might be able to consider, well, it shows he was there. Maybe it was not a murder. But maybe he participated in one of the lesser included crimes.

Q. Did you—in your opinion, was the question on DNA, was it relevant to any issue of the trial?

A. I think so.

Q. Okay. And was any DNA evidence used at the trial?

A. Yes, it was.

Q. Now, when you filed your motion for a new trial, did you request a hearing on this issue?

A. I presented it to the Court. Yes. I think it's part of the motion there.

Q. All right. Did you obtain an evidentiary hearing on it?

A. I don't think so. No, I don't think there was an evidentiary hearing. It was presented, but no, there was no evidentiary hearing.

Q. All right. Did you get a copy of an order denying it?

A. That, I don't recall.

Q. All right. Nevertheless, you were not allowed to [8] present any evidence as to why you felt this claim was proper?

A. Right. No, there was no hearing.

Q. Was there any—When you filed your motion for a new trial, did Mr. Trevino get another attorney appointed to him to represent him at that point?

A. I don't think so. I didn't represent him on appeal. I'm not really sure when the attorney that represented him on appeal was appointed.

Q. Okay. But this was for the direct appeal; correct?

A. Right, uh-huh, direct appeal.

Q. Okay. So, as far as you know, no other attorney was appointed to represent him or Mr. Trevino when you filed this motion for new trial?

A. Right.

Q. Okay. In fact, I believe, is it not correct, that in one of your objections during jury selection process you mentioned that there was a person who had some medical knowledge?

A. There was what?

Q. Who had some medical knowledge?

A. I think there was. I really don't recall all of the questioning of the jurors, because we saw almost a hundred of them.

Q. Okay. I understand. All right. Let me go on to some other of our claims for relief, and later on I will touch on [9] this one.

A. Okay.

Q. Do you recall when a juror, Michael Joseph Conlen, C-O-N-L-E-N, was questioned by you and Mr. Gus Wilcox?

A. Honestly, I don't recall it. But I've looked at your writ, and I think that was one of the jurors that was handled by Mr. Wilcox. But I would have been present, yes.

Q. Yes, you were present. Do you recall any testimony that he gave at the—during the jury selection?

A. Other than what's in your motion, no. I mean, your writ.

MR. RODRIGUEZ: May I approach the witness, Your Honor?

THE COURT: Uh-huh.

BY MR. RODRIGUEZ:

Q. Mr. Trevino, this is Volume 4 of this record at the trial that you participated in. Okay? And do you see that notation there, Michael Joseph Conlen; correct?

A. Uh-huh.

Q. Okay. Do you need a minute to familiarize yourself with this?

A. Yes.

Q. Okay. Go ahead.

(WHEREUPON, brief pause.)

MR. RODRIGUEZ: Volume 4, specifically page 29, [10] Mr. Trevino.

BY MR. RODRIGUEZ:

Q. Okay. If you would look at the same volume, well, I'm not certain. I need to approach you, because I'm not certain at what point this is.

A. Page 58?

Q. Well, there's page 58 of the writ. Keep going. How about 47 to 50 there?

A. Okay.

Q. This is where he's challenged for cause?

A. Yes.

Q. Okay. And the Court denied it. Correct?

A. Yes.

Q. And go ahead and read on a couple of pages, because is it not true then, then I think the prosecutor starts the questioning on reasonable doubt. Is that correct?

A. What I have here is the Court is starting to explain. The Court is speaking, not the prosecutor.

Q. All right. But the Court is speaking about what, reasonable doubt?

A. Uh-huh. Right.

Q. And it asks—What does the Court ask the jury?

A. Do you want me to read all of it?

Q. Yes. It's just two lines.

A. Is that the one where you're saying, "Of course. [11] Well, yes, of course, but I'm concerned that you're going to hold him to a higher standard than the law requires"?

A. This one here (indicating).

Q. Page 55.

A. "All right. If you believe beyond a reasonable doubt then you could find the person guilty?"

Q. And what did the juror respond?

A. "Yes, if I believe it, yes, that's what I've been saying, Your Honor, I'm fine with that".



Q. Okay. And that juror was challenged for cause?

A. He was. I don't know if it was renewed later.

Q. The question I have is, did you object to the State's challenge for cause on that one?

A. Well, I see Mr. Wilcox here taking the juror over several times and let me see if I can see where the Court—

Q. Well, page 57?

A. Okay.

Q. Do you see where the Court is?

A. It says, "All right. I'm going to grant the prosecutor's challenge. That means you will not have to worry about the whole process, Mr. Conlen. You are free to go".

Q. There was no other objection from you or Mr. Wilcox?

A. No.

Q. Any reason for not objecting to that challenge for cause?

[12]

A. Well, I mean, from what I remember, looking at this thing, it seems like the juror was vascilating. I mean, he went from one side to the other. And it just depended on who the last person was that talked to him. And I mean, he wasn't a juror that I voir dire'd, but I think my approach to that would have been if the guy is vascilating and he goes, you know, I talked to him for 20 minutes and he says yeah, I could do it; and then the prosecutor takes him over and he says no, I

could never grant the death penalty, vote for the death penalty, the law says that the Judge decides whether the juror is qualified to sit or not. So, no, we did not object, to answer your question.

Q. And do you recall during the trial hearsay statements from a Juan Gonzales and a Santos Cervantes?

A. Yes.

Q. Do you recall about them saying it was cool about snapping the deceased's neck?

A. Yes, I did, something like that.

COURT REPORTER: You need to keep your voice up. I'm having a difficult time hearing you.

MR. RODRIGUEZ: Okay.

BY MR. RODRIGUEZ:

Q. Do you recall statements from Juan Gonzales when he stated—

A. Oh, I remember him. Yes.

[13]

Q. Okay. What were his statements then?

A. Well, I mean, he came in—I'll paraphrase a bit, because I don't remember exactly, and he said some very damaging statements, you know, which we—I think we tried to keep out in a hearing out of the presence of the jury. But I think the Judge ordered or ruled against us.

And he said something, "I learned how to kill" and then, but he didn't say "in prison" at the guilt or innocence stage. And then at the punishment stage I think

he says the whole thing, "I learned how to kill in prison".

Q. Did you lodge any objections or did you agree to include that statement in there?

A. Well—

MR. SHAUGHNESSY: Your Honor, the record will reflect what happened in the trial. I don't think it matters whether Mr. Trevino remembers or not at this point.

THE COURT: Overruled.

MR. RODRIGUEZ: Well, I have to establish, set that predicate, and then establish whether the—

THE COURT: See, you won. I said overruled. You need to listen.

MR. RODRIGUEZ: I'm sorry.

THE WITNESS: No, we didn't object each time it came up, I think for the reason—Normally what I do, we conducted the hearing, as you know, the Judge ruled against us [14] and evidence was admitted. And I try not to bring—I mean, I feel that if I stand up and start objecting each and every time to something that I know what the Court is going to rule on, that all I do is bring extra weight or credibility or notice to it. And that's why I didn't do it. Right or wrong, but that's what I did.

BY MR. RODRIGUEZ:

Q. All right. Okay. I understand that hearsay is quite often denies the right of confrontation to cross examination?

A. Yes.

Q. So, it is something of a Sixth Amendment Constitutional issue. All right. And again, I think you just testified, Mr. Trevino, at the punishment phase when this same hearsay testimony was brought in—

A. Right.

Q. —again, you did not object to that?

A. I don't recall objecting to it, no.

Q. All right. There's also a—some hearsay evidence introduced regarding some gang membership. Do you recall that?

A. Yes.

Q. That was by Mr. Morrill?

A. Right.

Q. Did you recall—

MR. SHAUGHNESSY: Could I give the Court Reporter a spelling? I believe it's M-O-R-R-I-L-L.

[15]

COURT REPORTER Thank you, Mr. Shaughnessy.

BY MR. RODRIGUEZ:

Q. Do you recall the testimony given by Mr. Morrill?

A. Not verbatim, but I remember he testified.

Q. Okay.

A. He testified, I think, primarily as to gang activity in prison.

Q. Okay. And he was with the Institutional Division of the Texas Department of—

A. He was or he was retired, one of the two.

Q. And he testified, also, for some other documents he brought in, did he not?

A. Yeah. I'm sure he did.

Q. Okay. And those documents pertaining to a gang—prison gang, the Pistoleros. Correct?

A. Right.

Q. And isn't it true that—well, did he testify that he knew where the documents or the information in the documents came from?

A. I'm not—I can't remember that.

Q. Okay. Nevertheless, there was no trial objection to that hearsay evidence was there?

A. None that I can recall.

Q. Was there any reason for that? Did you consider that trial strategy?

[16]

A. Well, if there was no objection, I mean, normally at punishment it's pretty much wide open as to what comes in, what the Court deems relevant to sentencing. And I think that yeah, I mean, to object would have not caused anything. I mean, I don't think it would have been a valid objection.

Q. Why do you think it was not a valid objection?

A. Because I think the evidence is admissible.

Q. Okay. Would you tell me why you think the evidence was admissible?

A. Well, that's just my understanding of the law. I could be wrong on that, but that's just my understanding of it.

Q. Okay.

MR. RODRIGUEZ: Pass the witness.

CROSS EXAMINATION

BY MR. SHAUGHNESSY:

Q. Mr. Trevino, how long have you been licensed to practice law?

A. November 12, 1979.

Q. Could you state for the record what you did as an attorney prior to representing Mr. Carlos Trevino? I'm sure the Court knows, but other people who might end up reading this record may not know.

A. Well, of course, when I left out of law school?

Q. Sure.

A. Well, when I graduated from law school I got a job in [17] Washington D.C. working for the House Banking Committee. I was there for a while, left, the weather was too cold. And I got a job at the DA's office for about two-and-a-half years.

Q. What DA's office?

A. Bexar County District Attorney's Office.

Q. Okay?

A. And then I left and opened up an office in January 7th of 1983, and I've been in private practice ever since.

Q. In the intervening 17 years, have you practiced primarily criminal defense work?



A. Yes.

Q. During the course of that time, have you had occasions over the years to represent individuals charged with the offense of capital murder other than Mr. Trevino?

A. Yes.

Q. Do you recall how many by chance?

A. Maybe six or seven.

Q. All right. And have you also had occasion over the years to be in a position to represent people charged with other first-degree felonies?

A. Yes.

Q. At the time you began representation of Mr. Trevino, were you aware of the nature of the offense with which he was charged?

A. Oh, yes.

[18]

Q. And were you aware of the issues that would be presented to the jury should he be convicted of the offense as charged?

A. Yes.

Q. Do you recall how soon after his arrest you were appointed, if it was after his arrest? And to make it easier, I have the Court's transcript. I believe there's some documents in there. It might help you to refresh your memory.

A. And the question is, when was I appointed?

Q. Right.

A. The order is signed January 27th of 1997.

Q. And the offense was in June of 1997. Is that correct?

A. Yes.

Q. All right. Do you know whether or not the defendant had been indicted by the time you were appointed to represent him?

A. What I'm seeing here actually is Gus Wilcox's appointment in January of '97. Mine, I think, was significantly earlier, because this offense occurred in '96; didn't it?

Q. You might consult page 25 of that record you're looking at there.

A. Yes. I was appointed—oh, I know what's going on. His case was dismissed, I think, and re-indicted.

Q. I see.

[19]

A. That's why it's showing days of April 8th, '97 when the crime, I think, actually happened in the year before.

Q. Okay?

A. May or June of '96.

Q. Okay?

A. Let me check to see when that first appointment—or see if it's even in here.

Q. Well, if it's in the record, we'll find it later. But let me just ask you.

THE COURT: It may not be in that record if it's a different indictment.

Q. That's true. If you can find it in there, help us out.

A. I'll check. But that's what happened. That's what I think is causing—it shows we weren't appointed until a long time after this. And I remember when Mr. Trevino was brought over on his 30-day hearing. That's when I was appointed.

Q. So, you were appointed within 30 days of what?

A. Of the time of his arrest.

Q. The time of his arrest. So, to the best of your recollection, you would have been appointed sometime in July of 1996?

A. Yeah, something like that.

Q. Okay. Then to the best of your recollection, the case was dismissed and re-indicted and you were re-appointed?

A. Right.

[20]

Q. Then at some later point you approached the Court and asked for co-counsel to be appointed. Is that what happened?

A. Right. Because we were—yes, that's right.

Q. And that co-counsel would have been who?

A. Gus Wilcox.

Q. Could you state for the report to the best of your knowledge what Mr. Wilcox's background is?

A. Well, he's a criminal law specialist. I know that much. He was with the district attorney's office for many years before I hired on.

Q. Here in Bexar County?

A. Yes.

Q. To the best of your knowledge, how long has Mr. Wilcox been practicing criminal defense work?

A. Probably 25 years.

Q. Okay. Well, after you were appointed to represent Mr. Trevino and while we're on the subject, is he the individual to my left in the orange jail outfit the Carlos Trevino we've been talking about?

A. Yes.

Q. All right. Did you have any problems communicating with Mr. Trevino when you met? What I mean by that is, did he speak English to a degree that allowed you to communicate with him?

[21]

A. Oh, yes.

Q. All right. So, as best as you can recall then, there was no language difficulty separating you and your client?

A. No.

Q. All right. Did you have any unusual restrictions placed upon your ability to consult with your client while he was in custody?

A. None.

Q. So as far as you knew, your ability to consult with your client in jail was the same as everyone else in a similar situation?

A. Yes.

Q. All right. Did the 290th District Court place any hinderances on your ability to communicate with your client in any respect outside the normal restraints associated with a defendant who is in custody awaiting trial?

A. No.

Q. What were the first steps that you took pursuant to being appointed to represent Mr. Trevino to the best of your recollection?

A. I remember calling Robert McClure, who I think at the time was in charge of—I think under Steve Hilbig there was an attorney that was primarily in charge of deciding whether to seek the death penalty or not and he would act kind of like as an intake attorney for capital murders.

[22]

Q. Okay. Once again, we're talking about people that everybody here knows. Who is Steve Hilbig and who is Robert McClure?

A. Steve Hilbig was the elected DA back then, and McClure was an assistant DA and he continued to be one.

Q. Okay. And what was your rationale or your reasoning for speaking to Mr. McClure?

A. Well, in these cases sometimes time is of the essence, especially when there are many defendants. In other words, more than one. And it's important to jump on the cases, because if there's a deal to be had, it's always best to be the first one in the door, so to speak.

Q. All right. And I take it from the nature of your response, you were aware at the time you called Mr.

McClure that this case involved multiple actors. Is that right?

A. Oh, yes.

Q. Do you recall how many?

A. Multiple actors.

Q. Do you recall how many?

A. At least three others.

Q. Now, at the time you approached Mr. McClure, were you aware of the names of the individuals who were also charged in connection with the death of Ms. Salinas?

A. Yes.

Q. Were you aware of who represented those individuals?

[23]

A. I think I was, yes.

Q. Okay. And you approached Mr. McClure for purposes of exploring the possibility of pleading guilty to a certain offense in exchange, potentially, for the testimony of your client; is that correct?

A. Well, that's what I told him, but really what I wanted was discovery, you know, to see exactly where my client stood. Because we needed access to the file.

Q. Was this pre-indictment or post-indictment?

A. Pre-indictment.

Q. So, you were seeking discovery prior to jurisdiction attaching in the 290th District Court, right?

A. That's right.



Q. Okay. So, up—Because until that time, until a case is indicted, a judge can't order the State to give discovery, because there's no judge who has the case, right?

A. That's right.

Q. Okay. So, did you gain access to certain information in the possession of Mr. McClure?

A. Yes.

Q. As a result of these conversations?

A. Yes.

Q. And what exactly did you come into possession of?

A. Well, he basically let us look at the entire file.

Q. I see. When you say "us", are you referring to you [24] and Mr. Wilcox?

A. No. I think at the time I was already discussing the case with Ed Villanueva, who was eventually appointed as the investigator.

Q. All right. So, you and Mr. Wilcox were given access to the file prior to indictment?

A. Yes.

Q. Not Mr. Wilcox, Mr. Villanueva?

A. Yes.

Q. Okay. And what exactly was in the time—if you recall?

A. Yes. Well, there were these statements that eventually came in about, you know, "I learned how to kill" and "I learned how to kill in prison" and it was, I mean, not too much from Juan Gonzales but from a guy

named Bryan or it was another guy, another one of the people that was charged with the offense that was already trying to say that Mr. Trevino did the offense. And it was another statement where he—I think there was actually two guys that gave statements that were pointing the finger to Mr. Trevino.

Q. So, is it fair to say then that contained in the file that you were given discovery of were statements, written statements, of what later turned out to be co-defendants or State's witnesses?

A. Right.

[25]

Q. And those statements were inculpatory in nature as pertaining to your client?

A. Yes.

Q. All right. Do you recall what else was in the State's file?

A. Yeah. There was the investigator's report, you know, about the crime scene, and what else? Oh, just general reports that the officers put together, a bunch of pictures.

Q. Did you have access to the autopsy report prior to trial?

A. Oh, yes. Prior to trial, I don't think I had it at the time, you know, when I was talking to Mr. McClure I don't think I had the autopsy report at that time, but we got hold of it later.

Q. All right. Did you also have access to the search warrants and affidavit in support thereof that resulted in the State's seizure of bodily fluids from your client?

A. Yes.

Q. Did you have access to the two written consent to searches that were utilized to justify the searches in this case?

A. Yeah we saw them.

Q. Now, during the course of the pre-trial in this case, the record reflects that you filed a motion for discovery, and then when it came before Judge MacRae, you agreed that the [26] State had given you complete access to the file?

A. I think I did do that.

Q. Okay. Are you satisfied as you sit here today that you did, in fact, get complete access to the State's file as it existed at the time prior to trial? And when I speak in these terms, let's eliminate the consideration that DNA testimony was the subject of the dispute. With that included, did you get full discovery to the best of your knowledge?

A. Yes.

Q. Okay. Now, what else did you do in preparation for representing Mr. Trevino in trial?

A. Well, we contacted Juan Gonzales.

Q. You're speaking of Juan Gonzales, the individual who testified on behalf of the State, right?

A. Right.

Q. Okay.

A. And so we knew he was going to testify. He said, "I will if I have to". He did give some conflicting statements as to what went on.

Q. Were you able to take a written statement from Mr. Gonzales?

A. I talked to my investigator. I don't think he signed a statement, but I think Mr. Villanueva did, of course, put everything he said down in notes.

Q. All right. Were you present when that occurred?

[27]

A. I was not present.

Q. Okay. What else did you attempt to do on behalf of your client prior to trial?

A. Well, I talked to Mr. McClure and asked if we could reach a plea bargain. And I was very concerned. Number one, Mr. Trevino had just been released out on parole. Okay? And I knew that the nature of the crime was very, very serious.

So, I immediately tried to see if we could—And once I read the file, I said, gosh, you know, on its face, you know, it potentially could result in a conviction. And considering his recent parole, the jury might, you know, hold that very much against him.

So, Mr. McClure said I'll see if I can get an approval for a waiver of the death penalty if your client agrees to testify for us. Okay? So, about a few days later he comes back and says yes, I have the authority to give you that offer.

Q. And when you speak in terms of testifying for the State, who did Mr. McClure contemplate your client testifying against? Do you recall?

A. It was really open-ended. I guess whoever wanted to go to trial. They were still trying to decide who was going to be selected for the death penalty.

Q. Okay.

A. And so it wasn't really anyone in particular.

[28]

Q. Potentially, he might have been required to testify against any and all individuals indicted in connection with the death of Ms. Salinas?

A. That's right.

Q. Okay. Now, after you had this discussion with Mr. McClure, he indicated to you that he had obtained approval from Mr. Hilbig. Is that right?

A. That's right.

Q. And did you then approach your client with this information that you had obtained from Mr. McClure?

A. Yes.

Q. And did you explain to him the nature of what the State was offering?

A. Yes.

Q. And what was his response to that?

A. He eventually said yes.

Q. He did?

A. Yes, that he would accept it.

Q. And why did that never occur to your knowledge?

A. Well, we actually went to the district attorney's office, and Mr. Trevino started giving a statement.

Q. And when you say "we", it's yourself, your client, Mr. Wilcox—

A. No, not Mr. Wilcox, Mr. Villanueva.

Q. Okay. You, Ed Villanueva and your client are at the [29] district attorney's office doing what's known in the trade as debriefing? Is that what's going on?

A. Correct.

Q. Then what happened?

A. Mr. Trevino gave a few statements, but it was being pretty hard on him.

Q. Who was present for the State?

A. I think it was Ernie Lobello and Robert McClure and one other attorney, but I can't recall.

Q. Okay. Go ahead.

A. And he did start debriefing, but it was getting pretty emotional, so we decided to take a break. We came back two weeks later, a week later, and at that point Mr. Trevino had changed his mind and said he would no longer cooperate.

Q. All right. Did Mr. Carlos Trevino ever indicate to you that he desired to have a request for an examining trial filed?

A. No.

Q. Could you see any benefit to having an examining trial in this case?

A. No, because the file had been turned over to me.



Q. All right. Did your client ever indicate to you a desire to testify in front of a Bexar County Grand Jury?

A. No.

Q. Could you have seen any benefit that would derive from [30] his testifying in front of a Grand Jury?

A. No.

Q. The statement that Mr. Trevino started to make in the presence of Mr. Lobello and Mr. McClure, was that ever reduced to writing to the best of your knowledge?

A. It may have been notes, but certainly nothing Mr. Trevino signed.

Q. All right. And to the best of your knowledge, that was taken with an eye towards plea bargaining negotiations and not for purposes of use at trial?

A. Oh, no. And eventually, the State even waived the requirement that he testify.

Q. Okay. Now, after the plea bargain negotiations that would have required his testimony fell through, were there any other attempts to negotiate a plea on behalf of your client that didn't require his testimony?

A. Oh, yeah. Right.

Q. What happened in that regard?

A. Well, I got McClure to agree just to plea, just plead out to the capital.

Q. Plea guilty to the offense capital murder?

A. Right.

Q. And the State would waive the death penalty?

A. Right.

Q. Mr. McClure agreed to do that?

[31]

A. Yeah, with permission.

Q. Okay. That's fine. Did you then take that offer to your client?

A. Yes.

Q. What was his response?

A. No.

Q. Did he elaborate as to why?

A. Golly, I really—I can't recall why. I know he said no, but the exact reasons and so forth, I can't recall, no.

Q. All right. While I'm thinking of it, before I forget, are you related to the defendant in any way?

A. I don't think so. We've often discussed that. I don't think we are. Maybe somewhere down the line, but we don't know.

Q. Okay. Now, apparently then all attempts to resolve this without a trial proved fruitless, and you had to prepare for trial. Is that right?

A. That's right.

Q. At this time had Mr. Wilcox joined the defense team?

A. I think he had. Yes. Once the State pretty much knew they were going for the death penalty, Gus came on. He may have actually come on before he was actually appointed.

Q. Okay. What steps were then taken by the defense team in preparation for trial?

[32]

A. Well, of course, we had already reviewed all the evidence.

Q. And I want to talk about guilt/innocence first before we get to punishment.

A. Okay. I'll try and remember it as best I can, but I know we talked to witnesses. For example, I think I recall that Mr. Trevino and the other co-defendants had been at a party before. And then they went out on a beer run. So, we interviewed the witnesses at the party.

Q. Would that have been Mr. Mata? Do you recall?

A. I can't remember the name, but I know we did talk to him to try and see just exactly where Mr. Trevino had been and the hours and, you know, whether he was even present at the time of the offense.

Q. Okay.

A. So, we interviewed all the witnesses there. We tracked down where the 7-Eleven or Stop-N-Go, whatever it was.

Q. Pik-Nik Store?

A. Yeah, the Pik-Nik Store. We went over and talked to the clerk and, you know, generally just got a layout of the place there. Actually went out to the crime scene. I can't remember if it's Espada Park, I think, and checked that out. We talked to Trevino's stepfather and—

Q. Was that in connection with the consent to search issue?

[33]

THE COURT: Mr. Wilcox has come in. He might be a witness. Should we have him step outside?

MR. SHAUGHNESSY: I'll waive it with respect to Mr. Wilcox if it's all right with Mr. Rodriguez.

MR. RODRIGUEZ: That's fine.

THE COURT: Okay. Go ahead. Sit down.

THE WITNESS: Where was I?

BY MR. SHAUGHNESSY:

Q. Was that with respect to the consent to search issue? Do you recall?

A. The consent to search issue, I think, that that was part of a motion that Mr. Wilcox did.

Q. Okay.

A. That's what I recall.

Q. All right.

A. So, he would have more information than I would.

Q. Okay. Now, during the course of your preparation for trial, did you speak with your client regarding the events that formed the basis for the indictment?

A. Yes.

Q. And what was his recollection of the events and his participation therein as he related them to you?

A. Well, really pretty much as the record showed.

Q. Well, I'm confused. Did Mr. Trevino deny the events and his participation in them to you?

[34]

A. No.

Q. Did he say: I was never at Espada Park and I had nothing to do with the death of Linda Salinas?

A. No.

Q. Did he admit to you that he was present at Espada Park with Apolinar and Santos Cervantes and the rest of the cast of characters when Linda Salinas was killed?

A. Yes.

Q. Did he detail to you what role he played in her death and/or aggravated sexual assault?

A. He was kind of vague on that. He said he was too stoned.

Q. Too stoned to remember or too stoned not to do it?

A. Probably both.

Q. All right. So, to the best of your recollection, Mr. Trevino never denied being culpable under the law of capital murder as you know it?

A. I guess that's true.

Q. Did he ever offer any defenses in your conversations with him?

A. Well, that's really difficult to say.

Q. Well, let's try to narrow it down.

MR. SHAUGHNESSY: May I approach the witness, Your Honor?

THE COURT: Yes.

[35]

BY MR. SHAUGHNESSY:

Q. When I say defenses, I'm using the limited definition as provided by the Texas Penal Code. And let's start with—I show you the 1998 version of the Texas Penal Code, and ask you after conducting an investigation in this case and speaking with your client regarding his culpability in the matters alleged in the indictment, did you come into possession of any evidence that would indicate that he could have presented the affirmative defense of insanity to the offense charged?

A. No.

Q. Did you come into possession after investigating the case, come in the possession of any facts that would have supported, directly or impliedly, a defense of mistake of fact under 8.02 of the Texas Penal Code?

A. No.

Q. After your investigation into the facts of the case and conversations with the defendant, did you come into possession of any facts that would have allowed you to present the defense of mistake of law under 8.03 of the Texas Penal Code?

A. No.

Q. Same question with respect to 8.06?

A. No,

Q. Was your client an adult as defined by 8.07 at all times pertinent to the charges against him?

[36]

A. Yes, he was.



Q. Okay. We'll move on to what the Code speaks in terms of justifications, and I show you 9.22 of the Texas Penal Code. Did you ever come into possession of any facts, directly or impliedly, that would allow you to present the defense—or the justification of necessity on behalf of your client?

A. No.

Q. Did 9.31, self defense; 9.32, deadly force in defense of person; or 9.33, defense of third person play any role whatsoever in your representation of your client?

A. No.

Q. Is it fair to say then that there was no evidence to support any of those theories of justification under the Penal Code?

A. That's right.

Q. Same question with respect to 9.42, deadly force in defense of property?

A. That's right.

Q. Now, were you cognizant of the punishments available to the State at the punishment phase of this trial if he should be convicted of the offense alleged?

A. Yes.

Q. Okay. Were you also familiar with what at one time was known as the law of voluntary manslaughter, that is, the intentional killing of an individual arising—but is one that [37] arose from sudden passion arising from adequate cause?

A. Right.

Q. Now, to the best of your knowledge, with there any evidence to support a theory that the killing of Ms. Salinas may have been one that arose from a sudden passion arising from adequate cause?

A. There's no facts to support that.

Q. All right. Were you familiar at the time of trial with Chapter 46.02 of the Texas Code of Criminal Procedure defining the law of competency to stand trial, and I'll show it to you. That's 46.02, Section 1A. Were you familiar with that at the time of trial?

A. Yes.

Q. And do you remain familiar with it today?

A. Yes.

Q. During the course of your representation of Mr. Trevino, did any facts come into your possession to indicate that anything existed to support an argument that he was incompetent to stand trial at any course of the proceedings?

A. No.

Q. To the best of your recollection, he was competent at all times when he appeared in the 290th District Court?

A. Yes.

Q. Now, during your discussions with your client, did he give you the names of any witnesses that he wanted called on [38] his behalf at the guilt/innocence phase?

A. He gave me no names.

Q. Did you discover the identity of any witnesses who you felt would be beneficial to your case that you felt you needed to call that the State did not call?

A. No.

Q. Was Mr. Trevino consistent in his version of the facts in his conversations with you? And when I say facts, I mean his involvement in the kidnapping, rape and murder of Ms. Salinas?

A. Was it consistent?

Q. Right.

A. Yes.

Q. And his version was what? That he was stoned at the time and didn't remember too much?

A. Basically, yes.

Q. But he did not deny involvement therein?

A. That's right.

Q. And, of course, if he was intoxicated due to the consumption of beer and/or illegal drugs or legal drugs that would not have formed a defense to the offense charged. Is that correct?

A. That's right.

Q. Did you explain that to him?

A. Yes.

[39]

Q. Did you feel that was a fact that would—you wanted presented to the jury at the guilt/innocence phase?

A. No.

Q. Okay. Can you think of any circumstance in which it would have benefited Mr. Trevino to testify to that version of the facts at the guilt/innocence phase?

A. No.

Q. Did you explain that to him?

A. Yes.

Q. Did you explain to him that he had the right, should he so desire, to testify at the guilt/innocence phase?

A. Yes, he knows that.

Q. Did he indicate to you that he understood the nature of that right?

A. He does.

Q. And did he expressly inform you that he did not wish to testify?

A. That's right.

Q. What was your position with respect to potentially testifying?

A. I was against it.

Q. Did you convey that advice to your client?

A. Yes.

Q. Now, after having these conversations was your client and investigating independently the allegations of the [40] indictment, what theory of or what defensive posture did you decide to take in front of the jury at guilt/innocence?

A. Well, I think what we were hoping to be able to do, is somehow show that he was merely present and did nothing to commit the crime.

Q. And how did you seek to convey that to the jury?

A. Well, that was going to be a problem. I mean, that's problematic, as you can tell. Through questioning—they were only through—

Q. In order to do it through a witness, you would have had to have called one of the State's potential witnesses, right?

A. Well, right. That's part of the problem. So, I mean, I was going to—We would try and develop that through cross-examination at best, really. That's what we were going to have to do.

Q. Because, correct me if I'm wrong, but if you would have called any of those witnesses, they would have put your client at the scene, right?

A. That's right.

Q. And hence corroborated the witnesses called by the State; correct?

A. Well, yeah.

Q. So, you made a strategic decision to try to present a case of reasonable doubt through the cross examination of the [41] State's witnesses?

A. That's basically it.

Q. And prior to doing so, you consulted with your client?

A. Well, yeah. I mean, when you're trying to decide—it would have been wonderful to have been able to present witnesses, of course, you can only do so much through cross examination examination. So yeah, that's what we did.

Q. All right. Did your client ever express any displeasure with the strategy that you were going to employ?

A. No,

Q. Now, what was the strategy that you sought to employ at the punishment phase of the trial?

A. Well, that was tough. Okay?

Q. Well, before—let me back up a bit. Were you familiar at the time of the punishment phase unfolded with the issues that were going to be presented to the jury?

A. Yes.

Q. Now, bearing in mind that you knew what the issues were, what steps did you take in preparation for that punishment phase?

A. Well, really what we tried to do was to find a family member that could give us some idea as to where or how Mr. Trevino grew up. What was going on with his life. What were the circumstances, you know, regarding his past. And we tried to find them, but really, I don't think we came up with any [42] witnesses. We tried to contact his mother as best we could. She was from out of city.

Q. Let me stop you there. What was your theory behind wanting to show these facts to the jury?

A. Well, we were hoping that they would be able to find that there was a mitigating circumstance that would suggest that the death penalty is not appropriate.

Q. Arising out of the background of your client?

A. Right.



Q. And in order to try to find those mitigating circumstances, you sought to speak to members of his family?

A. Right.

Q. And were you successful in finding and speaking with one or more of those members of his family?

A. I think we talked to his stepfather. Well, I know we talked to his stepfather. Couldn't ever get hold of his mother. We tried. I know at one time she was actually in the courtroom, but I think she came into the wrong courtroom, because my understanding is that Carlos' brother was also being tried in the next courtroom at the time. And she came in and we tried to get hold of her, but were unable to. She was aware of what was going on, but just—

Q. Did you consult with your client regarding his desires as to who he wanted to present as punishment witnesses?

A. Yes.

[43]

Q. And what were his desires with respect to the punishment phase?

A. Well, I mean, we talked to him as to who we could call. And we never really got much of a suggestion as to who he wanted us to get. I mean, if he had given us names of anyone, we certainly would have tracked them down. I don't think Mr. Trevino had many suggestions as to who to call. In fact, I don't think he had any.

Q. Did you investigate or attempt to investigate his educational background?

A. Yes, we did.

Q. And what were the results of your investigation?

A. I don't know. Gosh. You're going to have to— Mr. Villanueva was the one that conducted that investigation. I don't recall exactly what was the result of that.

Q. All right, sir. But do you recall whether after you received the results of the investigation whether you felt it would be beneficial to present the results to the jury?

A. Yeah, right. I'm sure if I had, I obviously would have done so.

Q. All right. There was a witness who testified on behalf of the defense at the punishment phase by the name of Juanita DeLeon, the defendant's aunt. Do you recall that?

A. I really can't.

Q. Okay. There was a charge submitted in the instant [44] case in which the trial court informed the jury of the law of parole, and I'll show you what I believe to be Page 6 of the punishment phase charge.

A. Okay.

Q. The second paragraph, it starts with the phrase, "regarding the law of parole". Do you see that paragraph?

A. Yes.

Q. Now, as you're probably aware, the Court of Criminal Appeals has decided that a trial court is not required to give such a charge. Are you aware of that?

A. Yes.

Q. Were you aware of that fact at the time of the trial?

A. Yes.

Q. When that charge was placed in the Court's Charge, was it there because you wanted it there?

A. Yes.

Q. Did you feel that would benefit you?

A. Oh, yes.

Q. And did you utilize the presence of that paragraph in crafting an argument as to why your client should not be given the death sentence?

A. Yes, we did.

Q. And in the course of doing so, did you not also utilize to your benefit the testimony of Mr. Morrill, the gang dude from TDCJ?

[45]

A. Yes.

Q. Essentially to inform the jury of what constituted administrative segregation?

A. Right.

Q. Did you try to dovetail administrative segregation and the law of parole to plea to the jury he's not going to be dangerous because he's going to be in a cage for 40 years?

A. That and I think, if I remember correctly, that they are primarily locked up 23 hours out of the day and not let out at all.

Q. Okay. Did your client have any objection to informing the jury of the law of parole?

A. No.

Q. Okay. Now, Mr. Rodriguez made reference earlier to certain statements that were admitted in evidence that were attributed to your client. Something to the effect of "I learned how to kill in prison"?

A. That's right.

Q. And I believe there was also a statement of his that came out through Mr. Gonzales to the effect of "taking care of the witnesses" or something to that effect. Do you recall that testimony?

A. Yes.

Q. Now, did you discuss with your client whether, in fact, he had said those things? Do you remember?

[46]

A. Yes.

Q. Did he deny saying those things?

A. No.

Q. Now, briefly, with respect to Venireman Conlen, Mr. Rodriguez showed you what happened with respect to his potential service on the jury. If you had objected, what would have happened? What are the potential things that could happen?

A. Well, the Judge might rule for us and say, you're right, the State has a right to exercise a peremptory if they want or not.

Q. All right. What else could have happened?

A. We might have accepted him and put him on. I doubt that he would have made the jury, but he could have potentially wound up on the jury.

Q. The Judge could have granted your objection, forced the State to use a peremptory; right?

A. Right.

Q. The Judge could have overruled your objection and we would have what? An error that's preserved for review?

A. Right.

Q. Nothing more than that?

A. That's it.

Q. Okay. Now, Mr. Trevino, did anything with respect to the method employed by the trial court regarding compensation [47] to you hinder your ability to represent Carlos Trevino?

A. No. The Court paid for our experts, investigators, so no. The answer is no.

Q. Okay. Now, one last subject I would like to explore, and that's the DNA testimony. Is it your recollection that sometime during jury selection process that the State obtained the results of some DNA testing done on clothes of the victim?

A. That's right. That is when the results came in.

Q. Okay. And am I also correct in assuming that that testing was being conducted with your knowledge?

A. That's right.

Q. And it was potentially exculpatory to your client prior to the results coming in, was it not?

A. That's right.

Q. Because theoretically, it could have been linked—that the blood in question could have been linked to Mr. Apolinar, Mr. Cervantes or some of those other actors who were placed at the scene; correct?

A. That's right.

Q. But ultimately, it was not beneficial to your client. Correct?

A. That's right.

Q. Because the results came back, and your client could not be excluded as the donor of the blood found on the clothing of the victim; correct?

[48]

A. That's right.

Q. And sometime very late in jury selection those results came in? Is that right?

A. That's right.

Q. And your view of how that harmed you, or potentially harmed your client, was stated to Judge MacRae at the time; right?

A. I think so.

Q. And you sought a mistrial on the basis that was stated in the record, right?

A. Yes.

Q. All right. Now, if a motion for new trial on that issue had been held, would there have been any need to put on anything other than what was already in the record?

A. I think we developed the record pretty good. What I put in that was—yeah, I think that would have been it.



Q. So, if a motion for new trial hearing had been held, you would have called Mr. Wilcox and then he would have testified, I sure would have liked to ask these jurors about DNA, or Mr. Wilcox would have called you and you would have said the same thing, right?

A. I guess. Yeah.

Q. Then your views on that were expressed to Judge MacRae prior to the beginning of the guilt/innocence phase anyway, correct?

[49]

A. That's right.

Q. And as we sit here today, we don't have any reason to believe that the DNA expert called by the State was incorrect, right?

A. That's right.

Q. Because your client gave you a version of the offense which was consistent with the forensic testimony offered by the State. Correct?

A. Well, that's not really what he said.

Q. Who is "he"?

A. Mr. Trevino.

Q. Okay.

A. If you like, I'll tell you.

Q. Go ahead.

A. When we were starting voir dire, either Ms. Herr, one of the prosecutors, or Mr. Shaefer came up and said, "We're going to have additional DNA evidence done". There's certain tests that wasn't done and we found spots or staining or whatever. And I said, oh

yeah? So, I went back to Mr. Trevino, my client, and said, what do you want me to do? I can go up and ask for a continuance right now. We can do it, or we could roll the dice and let it go. But more importantly, before we do all that, is there any chance, and I mean any chance, that it might come back to you, and he said no. And that's what happened.

Q. That's why—

[50]

A. That's why we went ahead with the voir dire. Okay?

Q. I see.

A. For good or bad, that is what happened.

Q. Because potentially, based on what he was saying to you, if he was correct, it would be exculpatory?

A. You're right. And we would have been in a very good spot at that time.

Q. Right. And hence, your need to voir dire the jury on the issue wasn't crucial, it was the result that you needed.

A. Well, yeah, that's right. And perhaps, I mean in retrospect, I should have been more cautious and not gone forward with the voir dire. But at the time, that was the decision.

Q. And if you would have said, Your Honor, I would like to postpone the onset of voir dire, pending the receipt of this evidence, this test and conclusion, then really you would be in a position where you know the results, but nevertheless are still going to advocate the same defense on the part of your client, right?

A. Pretty much.

Q. And certainly, if that testing had never been done, the allegation could be made that you were ineffective for not seeking it, correct?

A. Yes.

[51]

Q. Now, the record also reflects that you sought and obtained the services of an expert in the field of DNA testing. Is that right?

A. Yes, it is.

Q. And how did you use that individual in an effort to benefit your client?

A. Well, I think Mr. Wilcox was primarily in charge of that. But I think people or the expert said what they wanted. We got the Bexar County Forensic Lab to forward everything over to them, and they conducted their own review.

Q. Did they conduct their own test or did they just review the procedures employed by the State's experts, or do you know?

A. I don't recall.

Q. Okay. There's been—.

MR. SHAUGHNESSY: Do you have the Court's file, Your Honor?

THE COURT: Yes.

MR. SHAUGHNESSY: The green one?

THE COURT: Yes.

MR. SHAUGHNESSY: Could I look at it?

**BY MR. SHAUGHNESSY:**

Q. Mario, the record reflects that on or about July 9th, 1997, you filed a motion to withdraw as attorney of record?

A. That's right.

[52]

Q. Did you discuss your reasons for that with your client?

A. I have the motion here.

Q. Oh, you have it? Okay.

A. I'm pretty—I don't recall if I told him specifically what I was going to put in the motion.

Q. Okay. Why did you seek to withdraw as attorney of record? Do you remember?

A. Well, it was really two fold. Number one, I mean, I don't think it's right for the trial attorney to do the appeal. And I think normally you do the appeal unless you're removed from it. That's number one.

Q. Okay.

A. Number two, I'm sorry—I have the motion for new trial. I have one for withdrawal of attorney as record?

Q. Right.

A. Maybe I should see that.

Q. Okay.

A. Oh, yeah. That's just what I would always do. If I try the case, I think it's in the client's best interest to have someone else do the appeal.

Q. All right. Did you discuss it with him prior to?

A. Yeah. Now, that I would tell him. I think it's best to have someone come in from the outside and look at everything.

[53]

Q. Okay. Did he have any problem with that?

A. No.

Q. I'm trying to find this motion for new trial. Have you had any conversations with your client since the Judge of this court granted your motion to withdraw as attorney of record?

A. No.

Q. Okay. Prior to the Judge granting your motion to withdraw as attorney of record, did your client ever express to you any discontent regarding how you conducted the defense on his behalf?

A. No.

Q. Have you come into possession from any source since the conclusion of the trial that could under any possible definition be exculpatory with respect to your client?

A. I have not.

Q. Have you come into possession of any facts since the conclusion of the trial that could be defined as mitigating as defined by the Texas Code of Criminal Procedure?

A. No, I have not.

Q. All right.

MR. SHAUGHNESSY: I don't think I have anything Else, Your Honor.

REDIRECT EXAMINATIONBY MR. RODRIGUEZ:

[54]

Q. Mr. Trevino?

A. Yes, sir.

Q. Going back to the cross examination about the DNA. If you were comfortable—I understand you were not happy with the results, but with the proceedings, why did you find it necessary to still file a motion claiming you were ineffective because of the DNA problem?

A. To preserve any error. I thought I would at least give somebody else a chance to review it. If I did make a mistake, let somebody else to say so.

Q. Did you think you were ineffective?

A. Well, I was not pleased, number one. I think where I really—where I really made a mistake, I should—well, I basically went on what Mr. Trevino told me. Okay? I mean, when he told me, no, there's no way that my DNA is going to be on that, that was the thing I used to draw my conclusions as to how to proceed. Perhaps I should have been more careful.

Q. Now, Mr. Shaughnessy asked you some questions about how you would conduct the evidentiary part in determining whether you were ineffective. Do you recall that?

A. Yes, I do.

Q. Are you aware that there's Federal case law saying that you would not conduct the hearing yourself?



A. Yeah. I think there is something to that effect.

Q. In other words, that would be a conflict of interest?

[55]

A. Well, I think it would be better done by someone else.

Q. So, you would not conduct this hearing to determine whether you were ineffective or—

A. Same reason I don't like to do the appeal.

Q. Right. It's an inherent conflict of interest. Correct?

A. Right.

Q. You obviously thought there was some harm?

A. Oh, yeah. I did. I thought that I—I would have wanted to voir dire the jury on DNA. I just would have. I don't know if it's objectionable or not, but I think that it would certainly be a line of questioning that I'm curious about.

Q. Is it your opinion that it was relevant to any issue at trial?

A. Oh, yes.

MR. RODRIGUEZ: No further questions.

MR. SHAUGHNESSY: Nothing further, Your Honor.

THE COURT: All right. Thank you, Mr. Trevino.

MR. RODRIGUEZ: We have no further witnesses.

MR. SHAUGHNESSY: State will call Gus Wilcox, Your Honor.

THE COURT: All right. Do you want to take a break before Mr. Wilcox? All right. We need to take a break [56] for the court reporter.

(WHEREUPON, brief recess.)

MR. SHAUGHNESSY: Before the break the State called Mr. Wilcox. After consulting with Ms. Welch, the State has decided that we'll not call Mr. Wilcox as a witness.

THE COURT: All right. Then may Mr. Wilcox be excused?

MR. SHAUGHNESSY: As far as the State is concerned.

THE COURT: All right. Thank you, Gus.

MR. SHAUGHNESSY: And Your Honor, you might—Are you going to close? Your Honor, during the course of the testimony of Mr. Trevino, it was revealed that the Defendant, Carlos Trevino, was indicted under one cause number and that was ultimately dismissed. And in that regard, I would ask the Court to take judicial notice of the pleadings in the case of The State of Texas versus Robert Carlos Trevino, Cause No. 96-CR-411B.

More specifically, I have marked as exhibits State's Exhibit No. 1, 2 and 3 out of that file, which are the indictment and the appointment of Mr. Mario Trevino and the ultimate dismissal in that cause. Just to clarify the record for the Court of Criminal Appeals.

THE COURT: All right. Any objections to those exhibits?

[57]

MR. RODRIGUEZ: No, Your Honor.

THE COURT: All right. State's Exhibits 1, 2 and 3 are received.

(Evidence admitted as State's Exhibit (Nos. 1, 2 and 3.)

MR. SHAUGHNESSY: With that, the State would rest and close, Your Honor.

THE COURT: All right. Any argument that y'all wish to present?

MR. SHAUGHNESSY: I'd like to present the State's arguments and the State's proposed findings, Your Honor.

THE COURT: All right. Would you like to do the same?

MR. RODRIGUEZ: Yes, but I would like to read bring some points before the Court.

THE COURT: Okay, fine.

MR. RODRIGUEZ: On the motion for new trial that counsel filed where he alleged that he was ineffective, I have a Federal Case from the Ninth Circuit.

THE COURT: Oh, my favorite.

MR. RODRIGUEZ: Yeah. They come out with good rulings, Your Honor. Anyway, it's Del Muro, M-U-R-O. United States versus Del Muro. And it says that this case, defendant's counsel post-trial filed a motion for new trial claiming he was ineffective. And what happened, is there was [58] testimony apparently, and this case was reversed because the Ninth Circuit stated that what should have happened was that when counsel filed a motion claiming he is ineffective, at that

point the district court should appoint an independent attorney, and then conduct hearings to determine if, in fact, counsel was ineffective on the issues he raised at motion for new trial.

This was not done in this case, and therefore, the issue of whether Mr. Trevino was in effect ineffective, as he alleged in the motion for new trial, was not fully developed.

Now, at this point I could not myself bring in or question him extensively to determine whether he was ineffective, because it would probably be a conflict for me, too, since I'm representing Carlos Trevino on the writ. According to this case, it should be an independent attorney who does that. And we're asking—

THE COURT: That would be you.

MR. RODRIGUEZ: Well, I'm not an independent attorney—

THE COURT: Yes, you are.

MR. RODRIGUEZ: —because I'm an attorney in this case.

THE COURT: Yes, you are. You're not attacking yourself as ineffective, you're attacking Mr. Trevino.

[59]

MR. RODRIGUEZ: I'm sorry. I didn't give you a case number. Anyway, what we're saying is it should have been an attorney appointed at that time that he filed a motion for new trial, an evidentiary hearing had on that point with; another attorney to determine if, in fact, he was ineffective.

THE COURT: So, therefore, he was doubly ineffective, and the trial court erred not once, but twice.

MR. SHAUGHNESSY: Your Honor, briefly, the State's position in this regard, and I don't want to prolong the record any longer than necessary. But assuming that Mr. Trevino should have sought to have someone else represent Mr. Carlos Trevino for purposes of the motion for new trial hearing, any defect in that regard has been cured today by this Court giving Mr. Carlos Trevino a hearing on whether Mr. Mario Trevino was ineffective during the course of the trial.

THE COURT: I would certainly think so.

MR. SHAUGHNESSY: And that's my understanding of what this case says. Because the only relief that was granted to Mr. Del Muro was a remand to conduct a hearing with a new lawyer.

Well, Mr. Carlos Trevino has a new lawyer and he's had his hearing on whether Mr. Mario Trevino and Mr. Gus Wilcox were ineffective during the course of the trial. So, everything he's entitled to he's had.

THE COURT: Yes, he has gotten. I believe so.

[60]

MR. RODRIGUEZ: Of course, we say the opposite, but let's not belabor the point.

THE COURT: Yes.

MR. RODRIGUEZ: As to the other ineffective assistance claims, we feel that those have been established under Strickland, and we will, as you say, appeal those later;

THE COURT: All right. If you will prepare your proposed findings of fact and conclusions of law, if you want.

MR. SHAUGHNESSY: Your Honor, my recollection of the statute is that the parties have 30 days—

THE COURT: That's exactly correct.

MR. SHAUGHNESSY: —from the date the record is filed, the record of this hearing.

THE COURT: Yes.

MR. SHAUGHNESSY: Are we going to be given—

THE COURT: We will be following the law of the State of Texas in all respects.

MR. SHAUGHNESSY: Well, that's encouraging—knowing you always do. That leads me to believe that after Holly files, that I'll have 30 days.

THE COURT: That is correct. I do not know how long it will take Holly to do this.

(END OF PROCEEDINGS)

[61]

THE STATE OF TEXAS \*

THE COUNTY OF BEXAR \*

I, HOLLY DIETERT, Official Court Reporter in and for the 290th District Court of Bexar County, Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings directed by counsel for the parties to be included in the Reporter's Record,



in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS MY HAND this the 21ST day of AUGUST, 2000.

---

HOLLY DIETERT, CSR  
Official Court Reporter,  
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Bexar County Justice Center  
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(210) 335-2696  
Expires 12-31-01  
Certificate No. 2559

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

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CIVIL NO. SA-01-CA-306-FB

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CARLOS TREVINO,

*Petitioner*

*v.*

DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT  
OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

*Respondent*

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Dec. 8, 2008

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**PETITION FOR WRIT OF HABEAS CORPUS BY  
A PERSON IN STATE CUSTODY**

**THIS IS A CAPITAL DEATH PENALTY CASE**

CARLOS TREVINO, Petitioner in the above styled and numbered cause, pursuant to 28 U.S.C. 2254, petitions this Honorable Court to issue a writ of habeas corpus ordering Petitioners release from confinement on the ground that Petitioner is being denied his liberty as a result of an illegal and unconstitutional judgment of conviction for capital murder and sentence of death.

Carlos Trevino, born January 24, 1975, a 21 year old Hispanic father of three, Conceived in the womb of his alcoholic mother, complicated by entrapments of Fetal Alcohol Syndrome (born prematurely, weighing only four (4) pounds at birth), and condemned by abuse both

physical (personally experiencing trauma to the head) and mental (witnessing the violent deaths of his cousins), and experiencing neglect (being left alone while his mother would go to bars) since his birth, was convicted of capital murder and sentenced to death. His trial attorneys were unaware and uninformed of his past and woefully failed to prepare for trial. Their efforts did not even approach then current 1989 ABA guidelines for the minimum standards of representation of a capital defendant. They failed to assemble a defense team consisting of a mitigation investigator and a mitigation expert, or a DNA, fiber or gang expert although the State introduced testimony from each at trial. The State proceeded to trial seeking the death penalty after offering Carlos a life sentence which trial counsel was unable to convince Carlos to accept. The State did not seek the death penalty against any of the other co-defendants including Santos Cervantes, the knife wielder and killer of Linda Salinas (the victim), according to a written statement by a third co-defendant Senando "Sam" Rey—which statement was never revealed to the defense trial attorneys by the State of Texas. All co-defendants received punishments less than the death penalty, with sentences ranging from 25 years to life in prison for crimes ranging from aggravated sexual assault to non-death capital murder. Juan Gonzales, a juvenile who was on probation, present at the crime scene and found by the trial court to be a party (an accomplice as a matter of law), testified at trial and was never criminally charged. Jay Mata, another party to the crime, was similarly not charged. Carlos' initial Writ attorney, who filed both the State and initial Federal Writ and withdrew due to illness, did no meaningful extra-record investigation, engaged no outside mitigation investigator nor mitigation ex-

pert, and uncovered no readily available mitigation evidence or the exculpatory statement of the co-defendant Seanido "Sam" Rey, or any other mitigation evidence included in this petition.. Ultimately, the Petitioner should be allowed to have his case fully, completely and effectively presented to a jury.

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## I.

**CONFINEMENT AND RESTRAINT**

Petitioner is confined on death row at the Polunsky Unit, Texas Department of Criminal Justice, Institutional Division, Livingston, Texas. Douglas Dretke, Director of the Texas Department of Criminal Justice, Institutional Division, is the state official responsible for the confinement of Petitioner. The District Court of Bexar County, Texas, 290th Judicial District, in and for Bexar County, the Honorable Sharon MacRae presiding, entered the judgment and sentence under attack. *See* attached Judgement of Conviction as Exhibit 1. The judgment was signed on July 7, 1997. *See* attached Judgment of Conviction as Exhibit 1. Petitioner is confined pursuant to this judgment imposing the death penalty for the offense of capital murder in Cause No. 97-CR-1717D. *See* attached Judgment of Conviction as Exhibit 1. Petitioner is indigent and has been indigent throughout all prior proceedings in this cause.

## II.

**HISTORY OF PRIOR STATE COURT PROCEEDINGS****A. TRIAL PROCEEDINGS**

Petitioner was arrested on June 13, 1996, charged with Capital Murder allegedly occurring on June 10, 1996, and indicted by the grand jury on April 8, 1997. [CR I, 13].<sup>1</sup> Petitioner entered a plea of not guilty. [CR

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<sup>1</sup> The clerk's record from the trial is contained in two volumes and one supplemental and will be referred to as CR and volume and page number and CR Supp. and page number. The court reporter's record from the trial is contained in 25 volumes, numbered 1 through 25 and will be referred to as RR and volume and page

II, 200; RR XVI, 6-7]. After jury selection was completed, his trial began on June 19, 1997, with the jury returning a verdict of guilty on July 1, 1997. [CR II, 186; RR XXI, 147-147]. The sentencing proceedings were conducted from July 2, 1997, until July 3, 1997, and the jury returned an affirmative answer to special issues number one and two and a negative answer to special issue number three. [CR II, 184-186; RR XXIV 47-50]. As required by the Texas State capital murder scheme, the trial court sentenced Petitioner to death on July 3, 1997. [CR II, 200-201; RR XXIV, 50]. A Motion for New Trial was filed timely on July 25, 1997. The trial court did not order an evidentiary hearing on the motion, and it was overruled by operation of law. [CR Supp., 4].

## B. DIRECT APPEAL

Attorney Richard E. Langlois was appointed to represent Petitioner on direct appeal to the Texas Court of Criminal Appeals. The brief for Petitioner was filed on September 4, 1998. The brief is 95 pages long so it has not been attached to this petition.

The brief for Petitioner raised 19 points of error. Point of Error 1 dealt with error in the denial of Petitioner's Motion for Mistrial at the conclusion of Voir Dire, when Petitioner was denied the opportunity to inquire from the jury their opinions regarding scientific evidence based upon DNA blood analysis. Point of Error 2 dealt with legally insufficient corroborating testimony of the accomplice witness, Juan Gonzales. Points

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number. Proceedings at the Writ Hearing will be cited as RRWH1 and page number. Exhibits used at trial will be referred to by the trial court number as reflected in the record.

of Error 3-5 dealt with the trial court's error in the admissions of hearsay by witness Juan Gonzales. Point of Error 6 dealt with insufficient evidence to support a finding of "yes" to special issue number one (future dangerousness). Points of Error 7 and 8 dealt with inadmissible evidence of gang affiliation presented at the punishment phase of trial. Point of Error 9 dealt with inadequate instructions to the jury regarding the special issues. Points of Error 10 and 11 dealt with the unconstitutionality of the Texas procedure for assessing the death penalty. Point of Error 12 dealt with the unconstitutionality of the Texas definition of "mitigating evidence" under the Eighth Amendment to the Constitution of the United States. Points of Error 13-15 dealt with the statutory *Penry* special issue and how it is facially unconstitutional under the Texas scheme. Point of Error 16 dealt with the arbitrary imposition of the death penalty in the state of Texas. Points of Error 17 and 18 dealt with the unconstitutionality of the death penalty as cruel and unusual punishment. Point of Error 19 contended that the death penalty was issued on the grounds of racial discrimination in this case.

The Texas Court of Criminal Appeals affirmed the conviction and sentence on April 4, 2001. *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999). A copy of the opinion of the Court of Criminal Appeals is attached as Exhibit 2. A petition for writ of certiorari with the Supreme Court of the United States was not filed.

### C. STATE HABEAS CORPUS PROCEEDINGS

On January 19, 1998, the Texas Court of Criminal Appeals appointed attorney Albert L. Rodriguez to represent Petitioner on the post conviction writ of habeas corpus in state court. On April 19, 1999, counsel timely filed with the 290th Judicial District Court Ap-



plicant's Post-Conviction Application for Writ of Habeas Corpus. The writ was filed (April 19, 1999) before the direct appeal was completed (June 7, 1999), so no days elapsed from the time that the direct appeal was completed until the filing of the writ.

On July 10, 2000, a hearing was held on the state writ. On December 21, 2000, Petitioner filed his Applicant's Proposed Findings of Fact, Conclusions of Law, and Order of Court. See attached Exhibit 3. On November 7, 2000, the State filed the State's Proposed Order which was adopted in its entirety by the Honorable Sharon MacRae on December 6, 2000. Judge MacRae simply adopted the State's proposed findings of fact and conclusions of law, recommending that relief be denied. The State's Proposed Order is attached as Exhibit 4 and the Court's Order is Attached as Exhibit 5. On April 4, 2001, the Texas Court of Criminal Appeals adopted the findings of fact and the conclusions of law and recommendation of the trial judge and denied relief. A copy of this Order is attached as Exhibit 6.

On August 16, 2004, a subsequent Application for Post conviction Habeas Corpus was filed raising two additional claims; 1) Defense counsel's failure to investigate and present compelling mitigating evidence at the punishment phase deprived Carlos Trevino of his Sixth and Fourteenth Amendment right to effective assistance of counsel and, 2) The Supreme Court's recent decision in *Atkins v. Virginia*, along with the Eighth and Fourteenth Amendments, prohibits the execution of Carlos Trevino, because he has been diagnosed with Fetal Alcohol Syndrome Disorder. A copy of the Application is attached as Exhibit 7. On November 23, 2005 the Texas Court of Criminal Appeals dismissed the application in an unpublished opinion as an

abuse of the writ. A copy of that dismissal is attached as Exhibit 8.

On August 2, 2006, proceedings were stayed in federal court in this matter to allow petitioner to file a second subsequent State Application for Post conviction Habeas Corpus to address newly-found *Brady* and associated ineffective assistance of trial counsel claims. Counsel representing petitioner in federal court filed a motion in the state district court for the appointment of counsel to assist petitioner in pursuing those claims in state court. The state district court refused to act on that request. On October 2, 2008, this Court lifted that stay order, concluding that “there is an absence of available state corrective process and circumstances exist which render the process ineffective to protect the rights of petitioner” pursuant to 28 U.S.C. §2254 (b)(1)(B), and concluded it would address the *Brady* and any related ineffective assistance of counsel claims.

### III.

#### ***PROCEEDINGS IN THIS COURT PURSUANT TO 21 U.S.C. § 848(q)(4)(B)***

On April 12, 2001, petitioner filed with this Court a Motion for Appointment of Counsel pursuant to 21 U.S.C. § 848. This Court appointed Albert Rodriguez as learned counsel on April 13, 2001, to represent Petitioner in this federal habeas corpus proceeding challenging his state criminal conviction for capital murder and sentence of death. Rodriguez did not request the assistance of second chair counsel (ABA Guideline 2.1), nor did he seek the assistance of a fact or mitigation investigator (ABA Guidelines 8.1—support services, 11.4.1—Investigation, 7—Expert Assistance (“counsel should secure the assistance of experts”)). This Court’s Order Appointing Counsel and Setting Deadlines or-

dered that the federal habeas corpus petition be filed on or before August 12, 2001. On September 21, 2001, this Court extended the due dates for filing of the federal habeas corpus petition to on or before December 21, 2001. On December 19, 2001, the Court extended the due dates for filing of the federal habeas corpus petition to on or before March 15, 2002. Petitioner's federal writ petition was subsequently filed on March 14, 2002.

On July 31, 2002, Attorney Rodriguez, having been appointed for the purpose of the federal habeas corpus proceeding in this matter, filed a Motion to Withdraw. *See* attached Exhibit 9. In August of 2002, attorneys Warren Alan Wolf and F. Alan Futrell were appointed as substitute Habeas counsel. On June 10, 2004, Petitioner's Habeas counsel filed a Motion to Stay and Abey the Federal Habeas Writ. On June 15, 2004, Judge Fred Biery ordered this matter returned to the 290th District Court for further proceedings in accordance with his Order. *See* attached Exhibit 10. On November 30, 2005, Petitioner notified this Court of the Texas Court of Criminal Appeals' ruling of November 23, 2005. On December 5, 2005, this Court issued a new Scheduling Order directing the petitioner to file his Amended Petition on or before March 3, 2006.

On January 23, 2006, F. Alan Futrell was removed as appointed counsel of record for petitioner, leaving undersigned Warren Wolf alone to represent petitioner in this federal habeas corpus proceeding, despite ABA Guideline 2.1 stating that TWO (2) qualified attorneys should be appointed in every death penalty case. On February 15, 2006, this Court extended the filing deadline to this Court extended the filing deadline to April 7, 2006 to file Petitioner's amended or supplemental petition. On August 2, 2006, proceedings were stayed in federal court in this matter to allow petitioner to file a

second subsequent State Application for Post conviction Habeas Corpus to address newly-found *Brady* and associated ineffective assistance of trial counsel claims. On October 2, 2008, United States District Judge Fred Biery lifted that stay order, concluding that pursuant to 28 U.S.C. § 2254 (b)(1)(B) “there is an absence of available state corrective process and circumstances exist which render the process ineffective to protect the rights of petitioner,” and concluded the District Court would address the *Brady* and any related ineffective assistance of counsel claims. Petitioner was ordered to file his amended petition, including all claims petitioner wishes the Court to consider in this proceeding, within 60 days. On November 14, 2008, Judge Biery denied several motions filed by petitioner, including a request to appoint a second chair attorney, and recused himself from this matter. The case was subsequently reassigned to District Judge Xavier Rodriguez. On November 25, 2008, Judge Rodriguez extended the time for filing this writ until December 8, 2008.

### PROCEDURAL HISTORY

Petitioner Carlos Treviño, age 21, was arrested on June 13, 1996 and charged with Capital Murder for his participation, along with four others, in the death of Linda Salinas on the night of June 10, 1996. (RR I, p. 13). Nearly one year later, on April 8, 1997, Petitioner was indicated in the 290th District Court, Bexar County, Texas for the offense of Capital Murder, Cause No. 97-CR-1717D. (RR I, p. 13). Petitioner’s lead trial counsel was Mario Treviño (no relation to Petitioner, RRWH1 21-22, 34). Attorney Trevino was appointed in July 1996. It was not until April 8, 1997 that Gus Wilcox was appointed as second chair, despite the time requirements of Articles 1.051, 15.17, 26.05 and 26.052 of the Texas Code of Criminal Procedure. Ed Villanueva



was appointed as a fact investigator. No mitigation expert was requested or appointed despite ABA Guideline 11.4.2.7—Expert Assistance. No psychologist, psychiatrist, fiber expert, gang expert, hematologist (to determine the origin of the blood found on the complainant's underwear found twelve feet from where her body was discovered), nor other expert was sought or denied in the preparation of a defense for the guilt-innocence or punishments phases of the trial, despite the recommendation of the minimum standards set forth in ABA Guideline 11.4.2.7 A, B, C and D regarding the investigation of capital cases.

The case was called for trial on June 20, 1997 and Petitioner was convicted of Capital Murder on July 1, 1997, (CR 169). He was sentenced to death on July 3, 1997. (CR 187). On July 25, 1997, a Motion for New Trial was filed asserting ineffective assistance of counsel. This Motion, however, was overruled, without a hearing, by operation of law. (CR Supp. 4). None of the co-defendants received the death penalty. None of the co-defendants went to trial for capital murder. Byron Apolinar received a 25-year sentence for the crime of aggravated sexual assault. Seanido "Sam" Rey received 50 years for the crime of murder. Jay Mata was never charged with a crime. Neither was Petitioner's cousin Juan Gonzales, who was on juvenile probation at the time. Santos Cervantes received a life sentence for the crime of capital murder.

Attorney Richard Langlois, unassisted by second chair counsel despite ABA Guidelines 2.1 ("two qualified postconviction attorneys should be assigned"), filed Petitioner's record-based appeal to the Court of Criminal Appeals. *See* attached Exhibit 11. The conviction and death-sentence were upheld by the Court, and the direct appeal was denied on May 12, 1999. *See Trevino*

*v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999), attached as Exhibit 12. Separate counsel, Albert L. Rodriguez alone, was appointed to perfect the State Habeas appeal on Petitioner's behalf, despite ABA Guideline 2.1 requiring two (2) qualified postconviction attorneys be appointed. Attorney Rodriguez used all the funds provided by the State of Texas for himself. He decided not to seek the assistance of experts despite ABA Guideline 11.4.1.7 ("Counsel should secure the assistance of experts"). Attorney Rodriguez followed none of these minimum guidelines. Attorney Rodriguez sought appointment in Federal Court to represent Petitioner Trevino on Federal Habeas Corpus. Once again, Attorney Rodriguez ignored the ABA Guidelines, despicably following suit by requesting no assistance and filing a similar Federal Habeas Corpus Petition arguing only *record-based* claims. See attached Exhibit 12. On May 13, 2002, the State filed a Motion for Summary Judgment. See attached Exhibit 13.

On July 31, 2002 Attorney Rodriguez, citing a myriad of disabling illnesses, filed a Motion to Withdraw from further representation of Petitioner Treviño in the federal habeas proceedings. See attached Exhibit 9. In August of 2002, attorneys Warren Alan Wolf and F. Alan Futrell were appointed as substitute Habeas counsel. On June 10, 2004 Petitioner's new habeas counsel filed a Motion to Stay and Abey the Federal Habeas Writ. On June 15, 2004 United States District Judge Fred Biery ordered the matter Stayed and returned to the Texas' 290th District Court for further proceedings in accordance with his order. See attached Exhibit 10. Petitioner filed a successor State Writ alleging mental retardation (Fetal Alcohol Syndrome) and Ineffective Assistance of Counsel. The Writ was denied by the Texas Court of Criminal Appeals as an



abuse of the writ. Mr. Futrell was subsequently removed as co-counsel, and Mr. Wolf was left alone to represent Petitioner in this effort, despite attempts to have a second chair counsel appointed in accordance with ABA Guideline 2.1.

In preparing to respond to the State's Motion for Summary Judgment, substitute counsel began by reviewing the filings and efforts of Mr. Rodriguez. In his Motion to Withdraw, Mr. Rodriguez succinctly stated the reasons for his decision to withdraw:

Over the last few years counsel has become progressively ill from a thyroid condition, diabetes, hypertension, and mental stress and depression from all of the above. Counsel is taking the following daily medications: Synthroid, Cartia, Glucophage, and Zoloft. Dr. Jose Sanchez has strongly urged that counsel discontinue death penalty writ cases as they greatly aggravate his existing medical condition.

*See Motion to Withdraw as Attorney for Petitioner, attached as Exhibit 9, p. 2.*

It is clear from Mr. Rodriguez's Motion to Withdraw that his medical and psychological conditions were long-standing, growing progressively worse, and taking a serious toll on his day-to-day functioning. It is also clear that practicing death penalty law was exacerbating all of his health problems. His physician "*strongly urged*" him to stop representing death row inmates in post-conviction proceedings, because such cases "*greatly aggravate his existing medical condition.*" Motion to Withdraw as Attorney for Petitioner, Exhibit 9, page 2 (emphases added).

Substitute counsel also noted that Mr. Rodriguez had raised only record-based claims on Petitioner's behalf in both the state and existing federal writ. Counsel immediately became concerned that Mr. Rodriguez' medical and mental conditions had affected his ability to undertake the full range of investigation, research and analysis that is required to properly represent a death-penalty petitioner on his one last opportunity for an adequate review. While Mr. Rodriguez refused to discuss his medical and psychological problems with substitute counsel, their resulting inquiry ultimately led to the identification of two additional, and even more compelling, claims for review.<sup>2</sup>

On June 10, 2004, Petitioner's Habeas counsel filed a Motion to Stay and Abey the Federal Habeas Writ so those additional claims could be presented to the State courts for review. On June 15, 2004, Judge Fred Biery ordered this matter returned to the 290th District Court for further proceedings in accordance with his Order. See attached Exhibit 10. On November 30, 2005, Petitioner notified this Court of the Texas Court of Criminal Appeals' unpublished ruling of November 23, 2005 rejecting the application as an abuse of the writ. On December 5, 2005, this Court issued a new Scheduling Order directing the petitioner to file his Amended Petition on or before March 3, 2006. Pursuant to the Order of this Court, Petitioner's federal habeas counsel timely sought appointment by the Honorable Judge Sharon MaCrea of the Texas 290th District Court to represent Petitioner in further state habeas

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<sup>2</sup> A summary of substitute counsels' findings regarding Mr. Rodriguez' conditions, and the effects thereof, is included in Exhibit 14.

proceedings. Judge MaCrea refused to either grant or deny counsel's request to be appointed. The United States District Judge denied the State's Motion to Life Stey, and gave the State Judge an additional 30 days in which to appoint counsel to prosecute the compelling *Brady/IAC* claims. These were the claims that had been brought to the Federal Court's attention and led to the granting of the second Stey. Again, the State Judge refused to either grant or deny the motion for appointment of counsel. This Court subsequently found that the state system was ineffective in protecting the rights of the Petitioner, and ordered that the state exhaustion requirement be waived, and the Stey was ordered lifted. The federal writ was ordered to be filed on December 1, 2008. That deadline was subsequently extended to December 8, 2008. Finally, on December 4, 2008, this Court granted Petitioner's request for independent testing of blood evidence from this case to the extent that it ordered that arrangements be made no later than December 12, 2008 for that evidence to be transported to the independent laboratory. *See Exhibit 42.*

In short, Petitioner Trevino was deprived of competent counsel in state habeas proceedings by the appointment of an attorney who was suffering from serious medical and psychological problems that death penalty postconviction practice greatly exacerbated, leaving him incompetent from the date of his original appointment as state habeas counsel. Petitioner Trevino did not have the assistance of competent counsel within the meaning of Article 11.071 of the Texas Code of Criminal Procedure and this Court's jurisprudence interpreting that term. Accordingly, this Court should consider the merits of Petitioner's claims and: grant habeas relief and order that the matter be returned for

a new trial on the merits or, alternatively, order an evidentiary hearing to determine the merits of petitioner's *Brady* and ineffective assistance of counsel claims, and whether initial State and Federal habeas attorney Rodriguez physical and mental disabilities rendered him incompetent to act as habeas counsel at the time of his initial appointment as state habeas counsel.

#### IV.

#### **STATEMENT REGARDING EXHAUSTION OF STATE REMEDIES**

Petitioner has exhausted the state remedies for the claims he is presenting in this federal habeas corpus action. Petitioner's claims were either made in the state habeas action, proven at the hearing on the state writ in the trial court but denied in the state court, or were raised and rejected by the state courts in a subsequent state habeas petition. Petitioner has met the burden, pursuant to 28 U.S.C. § 2254(b)(1). That an application for writ of habeas corpus relief of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state or as excused by the Federal court pursuant to 28 U.S.C. §2254(b)(1)(B).

With regard to the alleged *Brady* violations and the associated ineffective assistance of counsel claims addressed in Claims I and II, the federal district court has determined, in its order of October 2, 2008, that the petitioner "has exhausted his state remedies [with regard to those claims] such that there is an absence of available state corrective process and circumstances exist which render the process ineffective to protect the rights of the petitioner" pursuant to 28 U.S.C. §2254(b)(1)(B).

## V.

## CLAIMS FOR RELIEF

*CLAIM I*

PETITIONER CARLOS TREVINO WAS DENIED HIS CONSTITUTIONAL RIGHTS PURSUANT TO THE SUPREME COURT'S HOLDING IN *BRADY V. MARYLAND*, 373 U.S. 83, 82 S.Ct. 1194, 10 L.ED.2D 215 (1963) WHEN THE PROSECUTION WITHHELD FROM DEFENSE COUNSEL THE STATEMENT OF A CO-DEFENDANT IDENTIFYING A THIRD CO-DEFENDANT AS ADMITTING TO KILLING THE COMPLAINANT

*CLAIM II*

DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE TO PETITIONER CARLOS TREVINO IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO EFFECTIVELY USE THE INFORMATION PRESENT IN THE STATEMENT OF A CO-DEFENDANT IDENTIFYING A THIRD CO-DEFENDANT AS ADMITTING TO KILLING LINDA SALINAS

*CLAIM III*

DEFENSE COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT COMPELLING MITIGATING EVIDENCE AT THE PUNISHMENT PHASE DEPRIVED CARLOS TREVINO OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.



*CLAIM IV*

THE SUPREME COURT'S RECENT DECISION IN *ATKINS V. VIRGINIA*, ALONG WITH THE EIGHTH AND FOURTEENTH AMENDMENTS, PROHIBITS THE EXECUTION OF CARLOS TREVIÑO, BECAUSE HE HAS BEEN DIAGNOSED WITH A FETAL ALCOHOL SYNDROME DISORDER.

*CLAIM V*

THE STATE COURT FAILED TO HOLD AN EVIDENTIARY HEARING WHEN TRIAL COUNSEL, IN A MOTION FOR NEW TRIAL, CLAIMED HE WAS INEFFECTIVE, IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS AND THE SIXTH AMENDMENT.

*CLAIM VI*

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY AND THAT DEFICIENT PERFORMANCE PREJUDICED PETITIONER.

*CLAIM VII*

THE AGGRAVATING FACTORS EMPLOYED IN THE TEXAS CAPITOL SENTENCING SCHEME ARE VAGUE AND DO NOT PROPERLY CHANNEL THE JURY'S DISCRETION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.



**CLAIM VII**

**ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE IS UNCONSTITUTIONAL IN THAT ITS 12-10 RULE MAY ARBITRARILY FORCE THE JURY TO CONTINUE DELIBERATING AFTER EVERY JUROR VOTED TO ANSWER A SPECIAL ISSUE IN FAVOR OF THE APPLICANT.**

**VI.****STATEMENT OF FACTS**

Petitioner Carlos Treviño was arrested on June 13, 1996, and charged with Capital Murder, along with four others, in the death of Linda Salinas on the night of June 10, 1996. After sitting in jail for nearly a year, Petitioner was indicted on April 8, 1997 in the 290th District Court, in Bexar County, Texas, for the offense of Capital Murder in Cause No. 97-CR-1717D. In July of 1996, within thirty (30) days of Carlos' arrest, attorney Mario Treviño was appointed as lead counsel. Attorney Treviño was a former first chair felony prosecutor with the Bexar County District Attorney's Office, and an experienced capital trial counsel. Shortly thereafter, on August 13, 1996, the trial court appointed Edward Villanueva as a fact investigator in the case. Attorney Treviño immediately identified concerns associated with the case, balancing the rape and murder of a young girl with a client that was in a gang and on parole at the time of the offense. It quickly became evident, however, that the daunting nature of the case outweighed Treviño's ability to act as an advocate for his client, resulting in a denial of the minimum standards of the ABA Guideline 11.2.B ("Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized

practice of capital representation, zealously committed to the capital case..."). As such, Mario Treviño's failure to look beyond his own predetermined conviction of his client resulted in what can at best be described as a paltry effort to defend and represent Carlos during his capital murder trial. For whatever reason, Petitioner's trial counsel conducted a *de minimus* investigation into Carlos' social and family history. Counsel failed to inquire into *any* area of Carlos' life experiences, and did not meet with or talk to any of Carlos' family members, educators, social professionals, medical doctors, or mental health experts, prior to trial. Moreover, trial counsel's failure to ever make an opening statement foreshadowed the inadequate and inept performance that pervaded the guilt-innocence and punishment phases of the trial. Treviño declined to make an opening statement, suggesting instead that he would "wait for the appropriate time." Such "time," not surprisingly, never presented itself to trial counsel. When the punishment phase of the trial concluded, the sum total of witnesses presented by the defense was one (1). Moreover, the witness was Carlos' aunt, whom Mario Treviño had met for the first time in the courthouse cafeteria during lunch, shortly before she took the witness stand that afternoon. In a statement of facts exceeding twenty-five (25) volumes, the sole defense witness' testimony is recorded in five (5) pages, including counsel's self-introduction and questions. None of this even approached the minimum standards for the sentencing phase of a capital trial of the ABA Guideline 11.4.1—Investigation ("Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial"), 11.8.1 ("the sentencing phase of a death penalty trial is different from sentencing proceedings in other criminal cases"), and

11.8.3 F1, 2, 3 (regarding witnesses at the sentencing phase). Such a deficient effort resulted in a reversal in *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S.Ct. 2456, 2467 (2005).

If waiving his 'opening statement' was a warning of the poor performance to come, such trial performance was conceived almost a year earlier. Shortly after Mario Treviño was appointed to Petitioner's case, a deal was offered by the Bexar County District Attorney's Office for a life sentence in exchange for Carlos testifying for the State, against one or more of the four co-defendants in the case. However, during the process of providing a statement to the prosecutor, Carlos changed his mind. See Affidavit of Mario Treviño, Affidavit of Carlos Treviño and Transcript of Writ Hearing, pp. 27-31, attached hereto as Exhibits 15, 16 and 17, respectively. Trial counsel later explained Carlos' shift, without detail or elaboration, as a result of pressure from Carlos' gang affiliation. See Affidavit of Mario Treviño, Exhibit 15. Carlos explained the change of heart due to a lack of trust between himself and his trial counsel. See Affidavit of Carlos Treviño, Exhibit 16. Regardless, Treviño was able to secure a subsequent *second* offer from the District Attorney's Office, which did not require Carlos to testify. By this point, however, communication had broken down between Attorney Treviño and Carlos. The plea offer for a life sentence was deemed rejected by the State. The result for Mario Treviño was a bad trial experience. The result for Carlos Treviño, a sentence of death. This deadly result could have been avoided with a simple adherence to ABA Guideline 11.6.1, 2, 3 and 4. The plea negotiation process would have cured an unfortunate result.

In a case involving 39 state witnesses, 1 defense witness, 117 exhibits and 2795 pages of transcript, trial

counsel failed to follow even the most minimal standards set forth by court precedence and that of common sense. The records of the Bexar County Sheriff's Office (also referred to as "Detention Center" or "Jail"), indicate, Attorney Treviño met with Carlos *a total of four (4) times* from his initial arrest until the day of jury selection for his Capital Murder charges. According to the records, during the year he represented Carlos, Treviño spent a *grand total of four (4) hours and twenty-five (25) minutes*, including time which counsel signed in at the front desk and waited for officers to produce his client to the visitation booth, conferring with his death-eligible client prior to trial. Significantly, the first recorded visit with petitioner by Attorney Treviño was February 9, 1997, seven months after his appointment in July 1996. The last recorded attorney-visit was on June 1, 1997, the day before jury selection started, and lasted for *a total of thirty (30) minutes*.

| <i>Date of Visit</i>   | <i>Time In/Time Out</i> | <i>Length of Visit</i>   |
|------------------------|-------------------------|--------------------------|
| February 9th,<br>1997  | 16:51/17:55             | 1 hour and 4<br>minutes  |
| February 27th,<br>1997 | 10:42/12:05             | 1 hour and 23<br>minutes |
| May 8th, 1997          | 11:15/12:43             | 1 hour and 28<br>minutes |
| June 1st, 1997         | 16:15/16:45             | 30 minutes               |

See Business Records of Bexar County Sheriff's Office, attached hereto as Exhibit 18.

Ironically, the lack of communication was not a result of unforeseen or unknown barriers. According to

Attorney Treviño, there were no difficulties in communicating with Carlos, either language issues or any unusual restrictions placed by the jail. See RRWH1 23, Exhibit 17. Attorney and client had access just as any other attorney and client in Bexar County are allowed. There was, however, a considerable difficulty in exerting any significant effort on the part of defense counsel during the year leading up to trial.

Thus, although trial counsel, a professed criminal defense attorney for over seventeen (17) years, was obviously very concerned with proceeding to trial on this matter, clearly he did not spend any reasonable time explaining the pros and cons of the second offer extended by the District Attorney's Office. See RRWH1 34, Exhibit 17. Trial counsel bore the responsibility to ensure his client understood the ramifications of his decisions, outside of influences from the prison walls. The amount of time alone tells this Honorable Court that trial counsel could not and did not fulfill his responsibility.

Notwithstanding the appointment of counsel and an investigator, nearly one year before the start of trial, scarcely *any* investigation was conducted on Carlos Treviño's behalf. Neither his trial attorneys nor his fact investigator made an effort to find or develop any mitigation evidence, preventing the development and potential presentation of such during the guilt and/or penalty phase, contrary to ABA Guideline 11.1, Establishment of Performance Standards. According to trial counsel:

"Well, really, what we tried to do was to find a family member that could give us some idea as to where or how Mr. Treviño grew up. What was going on with his life. What were the cir-



cumstances, you know, regarding his past. And we tried to find them, but really, I don't think we came up with any witnesses. We tried to contact his mother as best we could. She was from out of the city."

*See* RRWH1 46, Exhibit 17.

Clearly, for most capital trial attorneys, this would have been a starting point. However, as with every other aspect of the trial, that attempt to find "a family member" yielded little, and the counsel's pre-trial investigation ended soon after it began. Although Treviño and Villanueva knew Carlos' mother lived only 100 miles from San Antonio in Bastrop County, Texas, they never made contact with her. (Treviño Affidavit). Trial counsel's efforts to find and develop witnesses who might provide beneficial testimony, apparently emanated from one of the limited conversations he had with Carlos. At the State Writ Hearing, Attorney Treviño indicated "He (Carlos) gave me no names." *See* RRWH1 42, Exhibit 17. Although he was certain Villanueva must have looked into Carlos' educational background, Mario Treviño did not know any of the results of that investigation. Certainly, none were introduced. *See* RRWH1 48, Exhibit 17.

Often times, in Capital cases, trial counsel complain their cases suffer as a result of limited resources. Not Attorney Trevino. Trial counsel made no request for a mitigation expert because they "were not used much at the time of trial" in Bexar County. *See* Affidavit of Mario Treviño, Exhibit 15. This, in spite of ABA Guideline 8.1—Supporting Services ("each jurisdiction should provide appointed counsel ... with investigative, expert, and other services necessary to prepare and present an adequate defense"). More specifically, al-



though he professed gang violence a major obstacle in the presentation of his case, Attorney Treviño, never even considered hiring an expert in the field of prison violence or prison gangs. Even after acquiring the knowledge that his client rejected a plea offer based upon pressure from prison gang members. See Affidavit of Mario Treviño, Exhibit 15.

On April 8, 1997, approximately three quarters (3/4) of a year after attorney Trevino was appointed, Gus Wilcox, an experienced capital trial counsel and former first chair Assistant District Attorney with the Bexar County District Attorney's Office, was appointed as trial co-counsel to assist Mario Treviño in this matter. As with everything else in this case, this last minute appointment was too little, too late. That appointment was made only fifty-four (54) days before jury selection began and seventy-three (73) days before the trial began.

By the time of the trial the prosecutors had not tendered to defense counsel any documents that included the statement of Seanido San Rey, which documents form the basis of the second motion to stay and abey in the Federal District Court, and gave rise to the Brady and associated Ineffective Assistance of Trial Counsel claims contained in Claims I and II.

On July 1, 1997, Carlos Treviño was found guilty of the Capital Murder of Linda Salinas. The punishment phase of the trial began, on July 1, 1997, lasting less than two full days. Testimony was presented to the Jury from ten (10) witnesses for the State, and one (1) defense witness. A brief summary of their respective testimony is as follows:

**State's Witnesses:**

A. Ralph Loony testified about the Defendant's prior adult criminal record, *without being cross-examined by defense counsel*. (RR, XXIII, pp. 4-11).

B. Loraine Reagan testified regarding the Defendant's prior juvenile criminal record. (RR, XXIII, pp. 12-36).

C. John Gutierrez, an investigator for the Bexar County Sheriff, testified about his prior dealings and experiences with the Defendant, *without being cross-examined by defense counsel*. (RR, XXIII, pp. 38-40).

D. Dario Gonzales, a Deputy District Clerk, testified about the Defendant's criminal records in Bexar County, *without being cross-examined by defense counsel*. (RR, XXIII, pp. 41-47).

E. Maria Espinoza testified about her experience when, years earlier, while was baby-sitting for a couple, Carlos was arrested for the theft of a vehicle which belonged to the parents for whom she was baby-sitting, also *without being cross-examined by defense counsel*. (RR, XXIII, pp. 48-52).

F. Nelson Atwell, an attorney and former Assistant District Attorney of Bexar County, testified about having had his Cadillac automobile stolen in 1990, implicitly by Carlos, *without being cross-examined by defense counsel*. (RR, XXIII, pp. 54-55).

G. John Riojas, a San Antonio Police Office testified about his interview with Maria Espinoza, concerning the vehicle theft she had reported, *without being cross-examined by defense counsel*. (RR, XXIII, pp. 57-64).

H. Jaime Aleman, a San Antonio Police Officer, testified about having arrested the Defendant, years earlier,

for unlawfully carrying a prohibited weapon. (RR, XXIII, pp. 65-77 and 80-82).

I. Bob Morrill, an employee of the Institutional Division of the Texas Department of Criminal Justice, provided a long and detailed history of gangs and gang activity in the Institutional Division, and further testified on the Defendant's gang affiliation., *without being challenged by defense counsel on the basis of hearsay, right of confrontation, or the relevance and reliability of the proposed "expert" testimony.* (RR, XXIII, pp. 90-132).

J. Juan Gonzales, a co-defendant, testified again, after having done so during the guilt-innocence phase of the trial, concerning statements Gonzales says the Defendant made shortly after the death of the victim, regarding where and how the Defendant learned to snap people's necks, and use a knife. (RR, XXIII, pp. 83-89).

#### ***Defense Witnesses:***

Juanita DeLeon, Carlos' Aunt, testified that she never knew the Defendant's father; that the Defendant's mother had an alcohol problem and couldn't make it from Elgin (Bastrop County), Texas, where she then lived; that the Defendant had been a good boy, growing up; that her children always liked to play and go with the Defendant to do things; and that the Defendant did roofing work from time to time. She spoke briefly about the Defendant's common-law wife and the young child they had; and that she knew the Defendant didn't do the things he had [by then] been convicted of doing. (RR, XXIII, pp. 135-140), *see also* Affidavit of Juanita Treviño DeLeon, attached as Exhibit 19.

Trial counsel presented *no evidence* on Carlos' family history, his educational background, his medical background or his accident-related head injuries, his

intellectual capacity, his psychological or psychiatric profile, his personality profile, or his lack of propensity for committing continuing acts of violence. Moreover, although the funds were clearly available, trial counsel did not hire, or request to hire, experts regarding Carlos' gang affiliation, a mitigation expert, a psychological expert to explain the effects of Fetal Alcohol Affect or a psychological expert to discuss future dangerousness. See ABA Guideline 11.4.1.2.C—Investigation (Collect information relevant to medical history (mental and physical illness or injury, alcohol and drug use, birth trauma, developmental delays), educational history (achievement, performance and behavior) ... family and social history (including physical and sexual or emotional abuse, prior adult and juvenile record) ... and religious and cultural influences.)

### **STATEMENT OF FACTS—2**

Petitioner had been drinking with Juan Gonzales, Seanido Rey, Santos Cervantes, Brian Apolinar and Jay Mata when they decided to go and purchase more beer at a convenience store. [RR XVIII, 171-174; RR XVI, 151-156]. At the last moment, Mata decided not to go. *Id.* Complainant, Linda Salinas, was using the pay telephone at the convenience store and Brian Apolinar recognized her. [RR XVIII, 176-177]. She was a friend of Santos Cervantes and accepted a ride to her friend's house. [RR XVIII, 177]. Instead of taking her to the friend's house, she was taken to Espada Park, a part of the San Antonio River on the south part of San Antonio. [RR XVIII, 180-181]. On the way to the Park, Cervantes was kissing Salinas in the car, and removed her brassiere. Salinas did not resist Cervantes' actions. At the park she was repeatedly sexually assaulted vaginally, anally, and orally. [RR XVIII, 182-187; RR XIX, 65-67]. Witness Juan Gonzales stated

that he witnessed Santos Cervantes take Salinas into the woods alone. RR XVIII, 181. He also testified that he witnesses Santos Cervantes and Brian Apolinar sexually assaulting the complainant while Petitioner was holding her down. [RR XVIII, 195]. Gonzales asked Santos Cervantes why they had killed the complainant, and Cervantes told him to mind his own business. [RR XVIII, 157]. Defendants drove back to Jay Mata's (neither tried nor indicted) house to burn the complainant's backpack. [RR XIX, 6-7; RR XVI, 157-158]. Juan Gonzales, at the punishment phase, testified that Santos Cervantes stated to Petitioner, "that it was cool about— ... neat about Carlos snapping her neck." [RR XXIII, 84]. Gonzales testified that petitioner replied that he had "learned how to kill in prison," and that Petitioner had also learned how to use a knife in prison. [RR XXIII, 84]. The testimony about the trauma to the neck was not relevant and the testimony about the knife became paramount.

On June 10, 1996, at approximately 2:00 p.m., the body of Linda Salinas was found at Espada Park. [RR XVI, 215-217]. During the autopsy, Dr. Vincent DiMaio, Chief Medical Examiner for Bexar County, Texas found that complainant had blood on the left side of the face, neck, chest, abdomen, legs, forearms, and hands. [RR XIX, 61]. Complainant had bruises on the right and left breast, and two stab wounds on the left side of her neck, inflicted with a dull top-knife, with a cutting edge. [RR XIX, 62-63]. The cause of death was the result of severe bleeding from a severed carotid artery located in the neck. [RR XIX, 63-68]. Complainant's vagina was bruised, and there was bruising and tearing in and around her anus. [RR XIX, 65-66]. Despite the testimony of Juan Gonzales, there was no bruising to the neck of the complainant. *Id.*



## STATEMENT OF FACTS—3

### Evidence Related to Guilt-Innocence

The evidence surrounding the facts of the Crime showed that on June 9, 1996 5 young Hispanic males [Santos Cervantes—D.O.B.: 3/8/78 (18 yrs.), Seanido "Sam" Rey, Brian Apolinar and Carlos Trevino] and one juvenile Hispanic male Juan Benito "Thatie" Gonzales—D.O.B.: 9/19/81 (14 yrs.) (Carlos' cousin) attended a party at Jay Mata's house. The group decided to go purchase some more beer at the Pic Nic convenience store off Division and South Flores. While Apolinar was pumping the gas, Rey went inside the store to pay for the gas. Cervantes saw Linda Salinas, the complainant in the case, talking on the pay phone outside the store. Cervantes approached Salinas and offered her a ride. This new passenger was unexpected and added on the spur of the moment. Salinas got into the 1983 Pontiac 4-door Sunbird with the 5 young males. She sat on Cervantes' lap who was sitting in the front passenger seat. Apolinar was the driver. Trevino, Gonzales and Rey were in the back.

As they drove away, Cervantes began to disrobe Salinas. He stripped her from the waist up, taking off her bra, leaving her bare-chested. They began to kiss and embrace each other in front of the others. Apolinar drove the group to Espada Park. Cervantes took Salinas out of the car and into the woods when he proceeded to rape her. *See* attached written statement of Seanido Rey, Exhibit 35. The ensuing contradictory testimony was elicited at trial by the State: The rest of the group followed shortly into the woods. Apolinar joined in by holding Salinas down. Rey was the next to sexually assault. Cervantes then ordered Salinas to turn over onto her stomach or he would strike her and



she reluctantly complied. Trevino then told his cousin, Gonzales, it was his turn. Gonzales declined and returned to the car as a lookout. RR XVIII, 185. Gonzales later returned to find Cervantes engaged in forcible anal intercourse with Salinas. Apolinar and Rey alternately forced their penises into Salinas' mouth, with Rey restraining Salinas during those times when he was not forcing Salinas to perform fellatio on him. RR XVIII, 185-186. Trevino participated by restraining her. RR XVIII, 194-195.

According to Gonzales it was Rey who told Cervantes "we don't need any witnesses." Cervantes repeated the idea down the line to Trevino who said "we'll do what we have to do. RR XVIII, 190-191.

The testimony of the medical examiner showed that Salinas had been stabbed in the neck twice with a knife, partially severing the carotid artery, and that she bled to death as a result. In response to a question about snapping complainant's neck Dr. Dimaio testified, "All I can say is there is no evidence that anyone tried it." RR XIX, 90.

As the quintet drove away Gonzales testified that Cervantes told Trevino that Trevino's snapping of Salinas' neck and his use of the knife was "cool" to which Trevino in youthful machismo and boastful braggadocio attempted to impress his peers by replying that he had "learned how to kill people in prison and use a knife." RR XXII, 83.

Juan Gonzales further stated it was Cervantes who, two days later broke the knife and threw it in a river. RR XIX, 29.

Cervantes was heard to say regarding Salinas' death, "Fuck that bitch, she didn't want to give it up so

I stabbed her.” See Exhibit 35. Cervantes later took Salinas’ backpack which she left in the car after returning to Jay Mata’s house and asked for some gasoline to get rid of the “evidence.” All of the boys watched Cervantes burn the book bag. Trevino left with Gonzales and returned to his aunt’s house.

The State offered evidence through a forensic fiber expert that fibers found on a pair of white panties collected at the crime scene were consistent with fibers belonging to Trevino RR XVII, 142-143. No *Kelly*<sup>3</sup> hearing was held to determine if this soft/junk science had any validity. No expert witness was presented by Trevino’s lawyers to rebut or explain such ridiculous testimony. No request for funds to hire such an expert, was made by the attorneys for Trevino despite knowledge that this “evidence” was in existence and that the State intended to introduce it. See ABA Guidelines 11.4.1.7—Investigations, Expert Assistance (Counsel should secure the assistance of experts for any portion of the prosecution’s case).

The State introduced a fingerprint expert to prove Trevino’s prints were found inside Apolinar’s car. RR XVIII; 34 No fingerprint expert was utilized by the petitioner’s defense team to verify the State’s experts findings nor were funds requested by the defense team for such a fingerprint examiner. See again, ABA Guideline 11.4.1.7.

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<sup>3</sup> *Kelly v. State*, 824 S.W.2d 568 (CCA 1992), is the Texas analog of *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 113 S.Ct. 2786, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) regarding the admissibility of expert evidence.

Lastly, the State introduced a forensic serologist who discovered a mixed blood stain that was found on Salinas' underwear which was submitted for DNA testing RR XIX, 118, 127. The results of that analysis excluded Cervantes, Rey, Apolinar and Gonzales as donors but did not exclude Salinas and Trevino RR XIX, 130-32. No test was conducted to determine whether or not the preservative EDTA was present in that blood stain—a test that could have determined when the blood that was similar to Petitioner's was introduced onto the complainant's underwear.

The attorneys for Trevino sent the State's serology test results to GeneScreen but did not have them check for cross-contamination or for the presence of EDTA. This was important because Trevino insisted his blood could not have been introduced to any article of clothing of Salinas because he had no open wounds on his body on the night of the incident. His attorneys did not follow up on this possibility by requesting their expert to check for the presence of EDTA and possible cross-contamination of the submitted DNA samples.

This failure of the defense to follow up a possible defense suggested by the petitioner caused the petitioner to totally lose faith in his counsel which ultimately led to his refusal to accept the offer for a life sentence which was extended by the prosecutor prior to trial. This failure violated ABA Guideline 11.2 Minimum Standards, to be "... zealously committed to the capital case."

The defense team did not have their DNA expert in Court to assist them in fashioning a cross examination of the State's expert, nor was the defense DNA expert there to testify to any other deficiencies he may have identified with the State's expert's testimony. *See*

ABA Guideline 11.8.3.2 ("counsel should consider ... expert witnesses ...to rebut expert testimony presented by the prosecutor").

After the trial, the defense fact investigator Ed Villanueva, after interviewing the jurors found that the DNA evidence to be quite compelling to them. *See Exhibit 33.\*\*\**

### **Evidence related to Punishment**

The State introduced evidence of Carlos' "violent" criminal history which mainly consisted of burglaries and car thefts. However, unlike his co-defendant, he had never been convicted of nor arrested for an assault, aggravated assault, murder, aggravated sexual assault, kidnaping or other violent crime. Although he had been arrested for possession of a weapon there was no testimony that he had ever used the weapon.

The State introduced his juvenile record though State Juvenile Probation Officer Lorraine Reagan. However the defense team never investigated by searching or using a mitigation investigator or mitigation expert which they never requested although the 1989 ABA Guidelines in effect at the time of the trial required same to be secured (Guideline 11.4.1 D. 7.)

The defense team did not even attempt to seek from the Court the funds to employ such investigative experts. When confronted with the guidelines Mario Trevino replied "It just wasn't done in Bexar County. (regarding mitigation experts and investigators). *But see ABA Guideline 8.1—Supporting Services.*

The juvenile records as well as Mrs. Reagan were readily available but never seen or reviewed by the defense. A custody review would show Carlos was a follower who got in trouble in an impulse driven situation

following others. Carlos was a good probationer who did well while on supervision (affidavit of Lorraine Reagan at exhibit 30). The jury never heard that testimony.

The State further introduced a “gang expert” Bob Merrill, an employee of the Institutional Division of the Texas Department of Criminal Justice. Mr. Merrill was not challenged under Rule 702, Tex. Code Crim. Proc. The Defense did not introduce nor did they seek the funds to hire their own expert to assist them as well as the jury to understand the history of prison gangs and that membership in prison gangs was a way of staying alive in prison. There was no evidence that Carlos committed any act of violence in furtherance of his gang affiliation nor that he subscribed nor had ever seen a document reportedly to be the constitution or bylaws of the *Hermanos Pisterleros* gang. See ABA Guideline 11.8.3—Preparation for the Sentencing Phase, F2 (counsel should consider the use of experts to rebut expert testimony presented by the prosecution).

\* \* \*

### ARGUMENT: CLAIM III

#### DEFENSE COUNSEL’S FAILURE TO INVESTIGATE AND PRESENT COMPELLING MITIGATING EVIDENCE AT THE PUNISHMENT PHASE DEPRIVED CARLOS TREVIÑO OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The ultimate question of effective assistance of counsel is a mixed question of law and fact that is reviewed on a *de novo* review. *Felder v. Johnson*, 180 F.3d 206, 214 (5th Cir. 1999). The legal principles gov-



erning the claims for ineffective assistance of counsel were established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ineffective assistance of counsel is comprised of two components: (1) the Petitioner must show counsel's performance was deficient and (2) the deficiency prejudiced the defense. 466 U.S. at 687, 104 S.Ct. 2052.

The *Strickland* Court required a party prove trial counsel's performance failed to meet generally accepted standards of competence and that there is a reasonable probability the outcome of the case was affected by counsel's deficient performance. Under such, "counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690, 104 S.Ct. 2052.

**A. Petitioner's Trial Counsel's Refusal to Initiate Any Form Of An Investigation, His Continuous Refusal To Have Any Meaningful Conversations With His Client And His Failure To Provide Reasonable Information and Consequences Associated With A Plea Offer By The State Are Blaring Examples Of Trial Counsel's Deficient Performance.**

To effectively establish *Strickland's* first prong, deficient performance, a petitioner must demonstrate that counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688, 104 S.Ct. 2052. The Supreme Court has continually refused to specifically articulate guidelines for appropriate attorney conduct and have instead opted for a more subjective test: "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*



1. Trial attorney Treviño's continuous refusal to ever initiate *any* type of an investigation into potential avenues of mitigation was clearly unreasonable.

Carlos Treviño's trial counsel wholly failed to meet the prevailing professional norms under any standard of reasonableness. Trial counsel has an obligation "to conduct a thorough investigation of a defendant's background" and thus, defense counsel's failure to investigate the basis of his client's mitigation defense can clearly rise to a level of ineffective assistance of counsel. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). While there is a broad range of professionally competent conduct in any case, courts generally require investigations regarding the accused's background and character, at a minimum. *Miniel v. Cockrell*, 339 F.3d 331, 341 (5th Cir. 2003). In fact, the Court most recently instructed that "we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background was itself reasonable." *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2537 156 L.Ed.2d 471 (2003), *Williams v. Taylor*, 529 U.S. at 396.

The *Strickland* Court held each case must be analyzed on a case by case basis, viewing such as of the time of counsel's conduct. Although no specific standards are required, the Court opined:

counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 691, 104 S.Ct. at 2052.

Importantly, an attorney's decision to limit an investigation *must* "flow from an informed judgment." (emphasis added) *Baxter v. Thomas*, 45 F.3d 1501, 1514 (11th Cir. 1995). An attorney must investigate different options and make reasonable choices from such. The deference required by *Strickland* does not include decisions that are "uninformed by an adequate investigation into the controlling facts and law." *United States v. Drones*, 218 F.3d 496, 500 (5th Cir. 2000). An essential part of either phase of the criminal defense, is a "substantial, independent investigation into the circumstances and the law from which potential defenses may be derived." *Baldwin v. Maggio*, 704 F.2d 1325, 132-33 (5th Cir. 1983).

In the present case, counsel's failure to uncover and present mitigating evidence cannot be justified as a tactical decision to focus on other aspects of Carlos' case because counsel completely failed to fulfill "their obligation to conduct a thorough investigation of the defendant's background." *Wiggins*, 539 U.S. 522 (citing *Williams v. Taylor*, 529 U.S. at 396), *see also* 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel on Death Penalty Cases (hereinafter 1989 ABA Guidelines), attached hereto as Exhibit 20. The ultimate question is not whether trial counsel should have presented a mitigation case; but instead, the issue is "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [Petitioner]'s background *was itself unreasonable*." *Wiggins*, 539 U.S. 523 (emphasis in original).

Petitioner acknowledges allegation of failure to investigate on part of counsel, mandates Petitioner to al-

lege with specificity “what the investigation would have revealed and how it would have altered the outcome of the trial.” *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989); *Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000) (counsel’s failure to investigate was deficient; it was not an exercise of informed strategic choice).

**a. Failure to comply with the ABA Guidelines**

The *Wiggins* Court further stressed defense counsel’s investigations “should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” *Wiggins*, 539 U.S. 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), at 93, 1989) (emphasis in original). When evaluating the ABA Guidelines, the Court noted certain topics should be considered for presentation, including “medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience and religious and cultural influences.” *Id.* at 524. The *Wiggins* Court’s reliance on the ABA Guidelines for capital defense harkens back to the *Strickland* decision wherein the Court set them as “guides to determining what is reasonable. *Id.*, *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052.

Petitioner’s counsel failed to uncover substantial important mitigation evidence regarding his family and social history. In the instant case, similar observations can be made with regard to the ABA Guidelines which the Supreme Court concluded should have guided trial counsel’s investigation and clearly did not do so. These standards clearly underscore the importance of defense counsel’s mitigation investigation, but also the potential

for strategy shifts between penalty and guilt phases of a capital trial, constitutionally and procedurally different than other criminal cases. 1989 ABA Guidelines 11.8.1 at 123.

Furthermore, the ABA Guidelines set forth specific standards for conducting an investigation into those individuals who might present testimony at the penalty phase. In such, trial counsel is required to seek out witnesses who are "familiar with aspects of the client's life history that might affect ... possible mitigating reasons for the offense(s), and/or mitigating evidence to show why the client should not be sentenced to death." 1989 ABA Guidelines 11.4.1 (D)(3)(B) at 95.

Additionally, the guidelines extend beyond lay witnesses and specifically address the issue of expert witnesses in preparation of the penalty phase suggesting counsel should consider retaining "[e]xpert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor." 1989 ABA Guidelines 11.8.3 (F)(2) at 129.

**b. Attorney Treviño halted the investigation before it ever began and before speaking to a single witness**

Clearly, Treviño's trial counsel's decision not to pursue mitigation was made on a prematurely truncated investigation. Neither trial counsel nor their investigator talked to *any* witnesses. They were presented with leads as to how to find individuals, but failed to follow up and delve into potential issues of mitigation. Counsel's conduct simply fell below and norms of reasonableness.

Assessing the reasonableness of an attorney's investigation requires consideration of "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 at 527. Even assuming Treviño's trial counsel limited their scope for strategic reasons, neither *Strickland*, nor *Wiggins* support such a " cursory " investigation. An attorney cannot simply claim "tactical decision" and halt the review. "Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id.*

This investigation is exactly like that described in *Wiggins*, an investigation of Carlos' background after "having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 524. Just as the *Wiggins* Court found, Carlos' trial counsel elected to abandon his "investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28.

**c. A plethora of information was available to Attorney Treviño upon the most rudimentary of investigations.**

Petitioner's trial counsel's failure to mount a reasonable investigation prevented important information from being presented to the jury.

(1) Petitioner's previous involvement in the juvenile system would have revealed issues resolved and unresolved from his childhood. A reasonably effective defense counsel would have pursued the information.

(2) Petitioner's ongoing changes at school, his testing and issues with other students would have allowed for a better understanding of Petitioner's actions. A rea-



sonably effective defense counsel would have pursued the information.

(3) A review of Petitioner's background and talking to a few key individuals in his life, would have plainly suggested the need to investigate Petitioner's psychological problems. He did not, to any degree, pursue the information. Ample evidence of childhood trauma at home that should have been pursued, head injuries, black-outs, delusional stories, family troubles, drug and/or alcohol addiction put trial counsel on notice of mental and psychological issues that should have been investigated.

A rudimentary investigation into any aspect of Carlos' background would have revealed an iceberg tip, which if pursued, would have revealed that Carlos had suffered a lifetime of adversity, disadvantage and disability. Any inquiry into Carlos' school records reveals a child repeating two (2) elementary grade levels, his attendance was poor at best; and his formal education ended during the ninth grade. Surely, this should have prompted further inquiry, which would have led counsel to Carlos' close family and friends.

Although *Strickland* does not require trial counsel to investigate every conceivable line of mitigating evidence no matter how unlikely, clearly in this case, trial counsel's performance was deficient under the first prong of the *Strickland* test. Mario Treviño's strategic choices were made after a "less than complete" investigation and are not supported by any reasonable professional norms. His investigation did not reflect reasonable professional judgment and is wholly inconsistent with the ABA Guidelines with which trial counsel should have been familiar.



2. A total breakdown of communication between Petitioner Treviño and his trial attorney not only prevented any meaningful discussion toward assisting in his defense but also affected essential discussion with regard to plea offers made by the State of Texas.

Meaningful discussion with one's client is a cornerstone of effective assistance of counsel. *Clark v. Johnson*, 227 L.Ed.2d 273, cert. denied 121 531 U.S. 1167, S.Ct. 1129, 148 L.Ed.2d 995.

Texas courts have found ineffectiveness of counsel is established in circumstances where counsel fails to communicate a plea bargain offer and the defendant states he would have accepted the plea bargain offer if he had been informed of it. *See Ex Parte Lemke*, 13 S.W.3d 791, 796 (Tex. Crim. App. 2000) (Defendants not informed of a plea offer by their attorneys are generally viewed as prejudiced by the missed opportunity to accept an offer and present it to the court for consideration in sentencing); *Paz v. State*, 28 S.W.3d 674, 676.

Merely conveying the plea offers to a defendant is not sufficient. Trial counsel bears an affirmative duty to convey reasonable information about the plea offer, its possible consequences and the legal alternatives so as to allow a defendant the opportunity to make an informed decision as to whether or not to accept the plea offer. *See Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."); *United States v. Barnes*, 83 F.3d 934-40 (7th Cir. 1996) ("It is deficient performance for an attorney to fail to provide good-faith advice about

the sentencing consequences of a guilty plea ... If this deficiency proves to be a decisive factor in a defendant's decision ... the defendant has lost the full benefit of his Sixth Amendment rights."); *Teague v. Scott*, 60 F.3d 1167, 1170 (5th Cir. 1995) (In determining whether or not to plead guilty, the defendant should be made aware of the relevant circumstances and likely consequences so that he can make an intelligent choice."); *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992) ("[A] defendant has the right to make a reasonably informed decision whether to accept a plea offer."); *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981) (where issue is whether to accept plea bargain or not, "the attorney has the duty to advise the defendant of the available options and possible consequences.")

In the case at hand, trial counsel did not explain the plea bargain accurately and thoroughly. Attorney Treviño discussed the initial plea offer with Carlos. The offer included a plea of life imprisonment in the Texas Department of Criminal Justice with eligibility for parole after thirty (30) years and required Carlos to testify against his co-defendants. That plea was rejected by Carlos, in major part due to the requirement to testify.

The State subsequently removed the requirement for Carlos to act as a cooperating witness and Petitioner Treviño indicated his willingness to accept the plea bargain. Yet, during the conference to sign the proposed plea bargain papers, the documents indicated parole eligibility would not occur until forty (40) years expired. The fact Carlos and his attorney had met only twice previously only added to the mounting commotion. Petitioner felt not only confused, but betrayed by his attorney and withdrew his plea bargain and pro-

ceeded to trial. *See* Affidavit Carlos Treviño, Exhibit 16.

In total exasperation, trial counsel simply wiped his hands of the process. Trial counsel never attempted to explain to Petitioner the reasons why he should accept this offer. Trial counsel never consulted with Carlos' family to provide guidance and assistance to Carlos as he attempted to make a life and death decision, literally. In the midst of all the confusion, trial counsel never pushed Carlos to understand a life sentence would enable Carlos to see his family, his wife and his children and to be a part of their lives. *See* Affidavit Carlos Treviño, Exhibit 16. To the contrary, upon Carlos' hesitation and confusion, attorney Treviño gave up on Carlos and any opportunity Carlos had for fair and reasonable representation during his legal escapades.

**B. Trial Counsel's Refusal To Mount An Investigation Resulted In His Failure To Present Evidence That Would Have Reasonably Assisted Jurors And Therefore Prejudiced Petitioner's Mitigation Claim During the Punishment Phase Of The Trial.**

Establishing a Sixth Amendment violation for ineffective assistance of counsel requires evidence under *Strickland's* "prejudice" prong.' A defendant "must show that there is a reasonable probability that, but-for counsel's professional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S.Ct. at 2052. Furthermore, in assessing prejudice, "we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. Without doubt, trial counsel's performance prejudiced Peti-

tioner's mitigation claim during the punishment phase of the trial.

Trial counsel's investigation simply did not produce mitigation of the same quantity or quality as what actually existed and what was later introduced at the post-conviction evidentiary hearing. Clearly, Treviño's trial counsel's knowledge of available mitigation was insufficient to make an informed strategic choice on these matters. Without having uncovered the information regarding Treviño's troubled background, his strategic choices were clearly made after less than a complete investigation. As previously stated, his actions cannot be seen as "reasonable professional judgments" supporting trial counsel's limited investigation. See *Wiggins*, 539 U.S. at 533.

The critical question asked of the jury, Special Issue Number Three, was:

Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Mario Treviño failed to provide just about anything for the jury to consider. Had a minimal investigation been performed into Carlos' background, the jury would have learned of a difficult life, with many physical and emotional obstacles.

**1. The sole witness presented by the defense was interviewed for the first time only hours before the presentation.**

The only testimony the jury heard on behalf of Carlos came from *the sole defense witness* in the entire case, Juanita Treviño DeLeon. Ironically, attorney Treviño met Ms. DeLeon *for the first time* in the cafeteria located in the basement of the Bexar County Courthouse during the lunch-break on the afternoon in which she testified. Affidavit of Juanita Treviño DeLeon, see exhibit 19. Ms. DeLeon's entire testimony comprises five (5) pages in the record. (RR, XXXIII, pp. 135-140), attached as Exhibit 21.

Moreover, during the penalty phase of the trial, the State presented evidence via ten (10) witnesses. In an unbelievable position, trial counsel *did not ask a single question* of six (6) of these witnesses. Not one question. Even more incredible, the questioning on the remaining four (4) witnesses was limited, at best. Trial counsel not only failed to mount a case with regard to punishment, but failed to make even the most rudimentary effort at defending against the State's presentation.

**2. The most rudimentary investigation would have exposed an abundance of information upon which trial counsel could have mounted a reasonable argument for mitigating circumstances.**

The simplest investigation by Attoreny Treviño, Wilcox, or investigator Villanueva would have revealed the exact history about which the courts are concerned. Carlos' mother drank heavily throughout his pregnancy and she experienced significant physical abuse from her father during the pregnancy. Carlos weighed only four pounds at birth and remained in the neonatal intensive care unit for several weeks. During this time, his



mother continued to drink heavily and visited her son only a few times. At the age of two, Carlos fell out of a moving car when the passenger door which he was standing and leaning against, suddenly opened without warning. Although he was visibly bruised, Carlos' mother did not seek medical attention for him. A similar incident occurred when Carlos was four and was witnessed by a police officer. She assured the officer she would take him for medical treatment, but once again, Carlos did not receive any. When Carlos was six years old, he fell and hit his head on a piano. He suffered a spontaneous nosebleed and has experienced spontaneous nosebleeds since that time. Finally, at the age of nine, Carlos was hit by a vehicle while crossing the street. He was knocked unconscious, treated and released. See Affidavit of Ann Matthews and accompanying report, attached as Exhibit 22.

From a very early age, Carlos faced adversity in his personal and family life. At five years old, Carlos' younger sister died from Sudden Infant Death Syndrome. He never recovered from this trauma. Furthermore, violence was present in Carlos' life from very early in his childhood. His mother's cousin, as well as a neighbor friend, were stabbed and killed when he was young. Carlos remembers inspecting the blood in the backseat of the car.

Carlos' mother described herself as emotionally unable to care for herself or her children. She continued to drink heavily and Carlos and his siblings were exposed to drug use by his mother, stepfather and other family members at a very early age. By age eleven (11), Carlos was using marijuana, alcohol and cigarettes. When Carlos was ten (10) years old, his mother took him and two younger siblings and they proceeded to move from one relative's house to another. When



their relatives would no longer care for them, they lived on the streets. During this time, Carlos' mother drank heavily and was often physically abusive to her children. By the age of twelve (12), Carlos was involved in street crimes, including stealing and minor violence.

Carlos dropped out of school during the 9th grade. "[K]ids made fun of me, my clothes, my shoes and we were always dirty." He had a difficult time with his academic performance, but was never placed in special education programs. See Affidavit of Josephine Treviño and Report of Dr. Rebecca A. Dyer, Ph.D., attached as Exhibits 23 and 24, respectively.

In October of 1992, Carlos Treviño, Jr. was born. Carlos admits his alcohol and drug abuse caused his relationship with Juanita Cantu, the mother of his child, to deteriorate. In late 1993, he was arrested for Driving While Intoxicated, Evading Arrest and Unauthorized Use of a Motor Vehicle for which he was sentenced to six (6) months in prison. While in prison, his wife left him. It was during this prison sentence that Carlos became involved in the prison gang known as the "Pistoleros Latinos." Carlos felt it was just expected that he join a gang in prison, so he did. Although Carlos vowed to stay clean upon his release from prison, after only three (3) weeks, he was drinking and smoking marijuana. A short time later, his cousin convinced him to attend to the party that ultimately led to the events of the question. See Dr. Dyer's Report, Exhibit 24.

Had trial counsel requested the mitigation expert he acknowledges he should have requested; he would have learned a great amount of information. Cf. *Bell v. Cone*, 535 U.S.685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (trial counsel's guilt theory of not guilty by rea-

son of insanity allowed counsel to put before the jury compelling mitigating witnesses of drug dependency and effects of Vietnam). He even acknowledged that he "should have gotten mitigation expert [sic] to do a psycho-social history of Carlos' life." See Affidavit of Mario Trevino, attached as Exhibit 15. After an extensive evaluation, Clinical and Forensic Psychologist Dr. Rebecca A. Dyer, Ph. D., offered the following:

- (1) Carlos presents with characteristics of Fetal Alcohol Affect. Studies have shown that individuals with significant prenatal exposure to alcohol tend to demonstrate varying degrees of cognitive, academic, attentional and behavioral difficulties throughout childhood and adulthood;
- (2) Carlos is functioning within the low average range of intellectual functioning. His verbal, performance and full scale IQ scores are consistent with those found in individuals with Fetal Alcohol Affect;
- (3) Carlos shows a history of employing poor problem solving strategies, attention deficits, poor academic functioning, memory difficulties and history of substance abuse, all characteristics consistent with Fetal Alcohol Affect;
- (4) Carlos' history of Fetal Alcohol Affect clearly had an impact on his cognitive development, academic performance, social functioning and overall adaptive functioning;
- (5) Carlos' history of Fetal Alcohol Affect, along with his history of physical and emotional abuse, physical and emotional neglect, and social deprivation contributed to his inability to

made appropriate decisions and choices about his lifestyle, behaviors and actions, his ability to withstand and ignore group influences and his ability to work through and adapt to frustration and anger;

(6) Carlos' background and cognitive abilities would have impacted his decisions to participate in or refrain from any activities that resulted in his capital murder charges;

(7) Carlos' background and cognitive abilities would have impacted his ability to understand and make appropriate decisions about the plea offer presented by his counsel; and

(8) Finally, Carlos' deficits with regard to social awareness and ability to confide and trust in his attorneys were exacerbated by his trial counsel's blatant lack of time spent with his client.

*See Exhibit 24.*

Additionally, although trial counsel and the investigator were only able to locate one witness, who counsel happened to run into in the Bexar County Courthouse cafeteria immediately prior to her testimony, there were other witnesses available for trial counsel to present during the penalty phase of the trial.

(1) *Ms. Janet Cruz*, the mother of Carlos' two children, who was then living in San Antonio, Texas. *Ms. Cruz* recalls that Carlos was a nice and loving father, whom she loved. She recalls that Carlos couldn't ever keep his attention focused on what he was supposed to do, and that he was easily distracted by his friends and people he looked up to. She relates that she didn't like a lot of Carlos' friends, and he would try to stay away

from him. But, according to her recollections, he was very easily influenced by those people, and they frequently talked him into doing the very things he had promised her he wouldn't do anymore. Ms. Cruz didn't understand how Carlos could seem so caring and sincere one minute, and then, hours later, be off doing something that he'd just told her he wouldn't do anymore. *See Affidavit, attached as Exhibit 25.*

(2) *Mr. Mario Cantu*, an older friend of Carlos, who had (then) known Carlos for over ten years, and was living in San Antonio, Texas, at the time of the trial. Mr. Cantu had spent considerable time around and with Carlos, during his childhood years. Mr. Cantu, today, states Carlos was a follower; and he was with Carlos, and other boys, when Carlos got into trouble for the first time. Mr. Cantu's perception of Carlos is that he was not an instigator, and he was generally a peaceful person. *See Affidavit, attached as Exhibit 26.*

(3) *Mr. Ruben Gonzales* was one of Carlos' employers. He hired Carlos as a laborer who helped in Mr. Gonzales' roofing business. Mr. Gonzales relates Carlos was a good worker, but was not someone who initiated work, or did things on his own. Mr. Gonzales recalls Carlos could follow instructions and demonstrations of how to do the work, and that he could perform his job duties well, but usually after example. *See Affidavit, attached as Exhibit 27.*

(4) *Ms. Jennifer DeLeon* is Carlos' sister. She recalls the frequent times when their mother would leave them with friends or relatives, or with no one at all, while she left with first one man, and then another. Ms. DeLeon remembers their mother was usually either drunk, or well on her way to getting that way. She relates their family rarely had any money, and they were

always out of, or needing food and clothes. But their mother wasn't working, most of the time, and most of the money she did get, was spent on liquor. Ms. DeLeon also recalls Carlos had difficulty in school, almost from the start. She recalls that he had to repeat a couple of grade-years, because his academic scores weren't high enough for him to pass to the next grade level. And she unequivocally states that none of the attorneys who represented her brother had ever contacted her, until December of 2003. *See Affidavit, attached as Exhibit 28.*

(5) In addition to those personal acquaintances, Carlos' school records were also available for presentation during the mitigation phase of his trial. Those school records reflect during his attendance at seven different schools, he repeated both the 2nd and 3rd grades; the records don't reflect his presence or performance for his 4th &/or 5th grade school years (1986); was socially promoted from 6th to 7th grade; was Placed in the 9th Grade, per Principal Directive, from where he was expelled in the second semester of the school year. *See Affidavit, attached as Exhibit 29.*

(6) His academic performance, including the repeated years, according to those school records was as follows:

| <i>Sch. Year</i> | <i>School Grade</i>     | <i>Grades</i> | <i>Absences</i> |
|------------------|-------------------------|---------------|-----------------|
| 1980-81          | Kindergarten            | C+avg         | 21 of 126 days  |
| 1981-82          | 1st Grade               | D avg.        | 18 of 174 days  |
| 1982-83          | 2nd Grade               | D avg.        | 19 of 175 days  |
| 1983-84          | 2nd Grade<br>(repeated) | D avg.        | 16 of 175 days  |
| 1984-85          | 3rd Grade               | F avg.        | 6 of 175 days   |



|           |                         |            |                                    |
|-----------|-------------------------|------------|------------------------------------|
| 1985-86   | 3rd Grade<br>(repeated) | C avg.     | 3 of 75 days                       |
| 4th Grade | No Records              | No Records |                                    |
| 5th Grade | No Records              | No Records |                                    |
| 1987-88   | 6th Grade               | C+ avg.    | [No Attendance Records]            |
| 1988-89   | 7th Grade               | 49.8 avg   | [No Attendance Records]            |
| 1989-90   | 8th Grade               | 54.6 avg.  | [No Attendance Records]            |
| 1990-91   | 9th Grade               | 39.0 avg   | [No Attendance Records]; Expelled. |

This is not a case where the initial investigation led counsel to believe further investigation would be fruitless or unwarranted. The fact is attorney Treviño simply gave up on Carlos and any opportunity he had at a reasonable defense and mitigation case after the plea negotiations fell apart.

The trial court records themselves reveal Carlos' juvenile records; yet, Carlos' trial counsel did not even take the time to talk to his juvenile probation officers, prior to trial, to determine the extent of his juvenile history. *Cf. Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 1514-1515, 146 L.Ed.2d 389 (2000). This limited investigation would have revealed information re-



garding his mother, his wife and his child. It would have shown Carlos as a responsible probationer and led counsel to his school records. It would have shown where Carlos performed community service and his history of employment. Moreover, the records would have revealed an individual with a lifelong relationship with alcohol and the effects therefrom. Trial counsel's failure to investigate Carlos' background demonstrates a complete failure to fulfill their obligation to their client. *Id.*

Had the jury been able to consider Carlos Treviño's mixed up and unexplainable turbulent and chaotic life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. *See Wiggins* 539 U.S. at 536. Multiple witnesses were available to testify regarding Carlos' positive traits. *See Exhibits 25-28.* These affidavits support that Carlos was a loving father, a good worker and a compassionate and caring friend and relative. Moreover, Carlos did not have an exceedingly violent criminal history that would contradict the mitigation evidence. To the contrary, his juvenile history consisted of Driving While Intoxicated, Evading Arrest, Unauthorized Use of a Motor Vehicle and Possession of Marijuana and Burglary. These are non-violent crimes. The only evidence in Carlos Treviño's juvenile record to suggest any violence was a charge of Unlawful Carrying. There were no allegations this firearm was used against another individual or that it was used in a violent manner. His own probation officer, had she been asked, would have described Carlos as "cooperative" and "remorseful." *See Affidavit of Lorraine Reagan and Juvenile Records of Carlos Treviño, attached as Exhibits 30 and 31, respectively.* These are not crimes upon which most jurors would

find "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. See Tex. Code Crim. Proc. 37.071 § 2(b). Clearly, the mitigation evidence, taken as a whole, "might well have influenced the jury's appraisal" of Carlos" moral culpability. *Id.* at 538.

Attorney Treviño's failure to investigate, at any level, rendered him completely unable to make a reasonable argument during the punishment phase of the trial. Because no other witness testimony was available upon which he could argue, Treviño was relegated to arguing Carlos would not be a future danger because he would be locked upon the Texas Department of Criminal Justice. His entire argument is not based upon Carlos as an individual, but upon the fact that he will be in lock down for 23 hours a day. If Carlos' attorney could not see this was a question about Carlos as a person, how could the jury be expected to do so? If Carlos' attorney did not see the importance of Carlos as an individual, how could the jury be expected to do so? RR XXIV, 22-23, attached as Exhibit 23. Treviño's arguments, such as they were, were undermined by co-counsel's rambling and disorganized arguments. *See id.*

Moreover, when the issue of mitigating evidence arose during the closing arguments, Carlos' attorney, was once again left without argument. "His mother couldn't even come up here to talk to you." RR, XXIV, p. 25, lines 17-18. The uncontroverted truth is that his mother did not testify *because she was never asked*. See Affidavit of Josephine Treviño, Exhibit 23. Worse yet, the investigator assigned to the defense, Edward Villanueva, was told "not to look for them [Carlos' relatives]." See attached Exhibit 33. Once again, Mario Treviño's refusal to ask the necessary questions and make the meekest attempt at investigation allowed the

jury to be misled and deny Carlos a reasonable quest at leniency via mitigating evidence. In the words of co-counsel, Mr. Wilcox, "the approach is and the law is to look at his background." RR XXIV, 34, lines 18-19. Trial counsel's failure to act prevented the jury from performing the very task with which they charged the jury.

In closing argument, the State of Texas argued Carlos Treviño has received a "fair trial according to due process and the law of the State of Texas, and of the United States." RR XXIV, 11, lines 6-8. The reality is just the opposite. Attorney Mario Treviño allowed his preconceived opinions about Carlos Treviño to inhibit his representation of his client. His failure to initiate even the simplest investigation prevented the jury from hearing any mitigating testimony. The result being a violation of Carlos Treviño's Sixth Amendment right to effective assistance of counsel.

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**EXHIBIT 5**  
**IN THE DISTRICT COURT**  
**290TH DISTRICT COURT**  
**BEXAR COUNTY, TEXAS**

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NO. 97-CR-1717D-W1

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EX PARTE CARLOS TREVINO,

*Applicant*

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Dec. 6, 2000

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[1]

***FACTS AND CONCLUSIONS OF LAW***

The applicant, Carlos Trevino, through his court-appointed attorney, Albert Rodriguez, has filed an application for post-conviction writ of habeas corpus under the provisions of Art. 11.071, Tex. Code Crim. Proc. Ann. (Vernon Supp. 2000) collaterally attacking his conviction and sentence to death in Cause Number 97-CR-1717D.

***HISTORY OF THE CASE***

Applicant was convicted of Capital Murder, with a sentence of death imposed. The instant application was filed on April 19, 1999, by counsel for applicant, Albert Rodriguez. A hearing was conducted to consider certain factual allegations contained in the applicant's pleadings. The applicant presented testimony in sup-

port of his allegations during a hearing conducted in the convicting Court on July 10, 2000.<sup>1</sup>

[2]

*FINDINGS OF FACT AND CONCLUSIONS OF  
LAW ON APPLICANT'S CLAIMS FOR  
RELIEF NOS. 1 AND 2  
(APPLICANTS' PLEADING, PAGES 3 THRU 5)*

In his initial claim for relief the applicant contends that this Court denied him the right to due process of law and a fair trial when the Court denied his motion for a mistrial based upon an allegation that he had been denied the opportunity to voir dire the jury panel on D.N.A. testing and analysis.

In his second claim for relief the applicant reasserts the first allegation and claims that the action of this Court resulted in a violation of his rights as guaranteed by the Sixth Amendment to the United States Constitution.

These contentions were raised on direct appeal and rejected. *Trevino v. State*, 991 S.W.2d 849, 851 (Tex. Crim. App. 1999).

Inasmuch as these claims were raised and rejected on direct appeal, they cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

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<sup>1</sup> Citations to the record from that hearing will be as follows: (W.H.R. \_\_\_\_). Citations to the record from the trial will be as follows: (C.R. \_\_\_\_), (R.R. \_\_\_\_).

The first and second claims for relief advanced by the applicant lack merit. Due to the lack of merit, it is recommended that relief be denied.

**FINDINGS OF FACT AND CONCLUSIONS OF  
LAW ON APPLICANT'S CLAIM FOR  
RELIEF NOS. 3 AND 4  
(APPLICANT'S PLEADING, PAGES 6 THRU 8)**

In his third claim for relief the applicant contends that the evidence is legally [3] insufficient to corroborate the testimony of the accomplice witness.

In his fourth claim for relief the applicant reasserts the third claim and urges that the conviction violates his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution as a result.

This contention was raised on direct appeal and rejected. *Trevino v. State*, 991 S.W.2d 849, 851 (Tex. Crim. App. 1999).

Inasmuch as this claim was raised and rejected on direct appeal, it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

Moreover, the need to corroborate accomplice witness testimony is based solely upon statutory grounds<sup>2</sup>, and has no constitutional foundation: *See: Cathey v. State*, 992 S.W.2d 460 (Tex. Crim. App. 1999); cert. den. \_\_ U.S. \_\_, 120 S. Ct. 805, 145 L. Ed. 2d 678 (2000); *Thompson v. State*, 691 S.W.2d 627 (Tex. Crim. App. 1984), cert. den. 474 U.S. 865, 88 L. Ed. 2d 153, 106 S.

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<sup>2</sup> Art. 38.14, Tex. Code Crim. Proc. Ann. (Vernon 1984)



Ct. 184 (1985). Therefore, assuming arguendo, that the accomplice witness was not sufficiently corroborated, that does not amount to the violation of a constitutional right which is a prerequisite to obtaining relief pursuant to a post-conviction writ of habeas corpus. *See: Ex Parte Long*, 910 S.W.2d 485 (Tex. Crim. App. 1995); *Ex Parte Tovar*, 901 S.W.2d 484 (Tex. Crim. App. 1995).

[4]

The applicant's third and fourth claims for relief are devoid of merit; it is recommended that relief be denied.

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON APPLICANT'S CLAIM  
FOR RELIEF NO. 5  
(APPLICANT'S PLEADING, PAGE 9)**

In his fifth claim for relief the applicant contends that this Court erred in admitting testimony from Juan Gonzales, to the effect that applicant had informed him not to speak with the police, on the grounds that the testimony of Gonzales constituted inadmissible hearsay.

This contention was raised on direct appeal and rejected. *Trevino v. State*, 991 S.W.2d 849, 852 (Tex. Crim. App. 1999).

Inasmuch as this claim was raised and rejected on direct appeal, it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

The fifth claim for relief states no basis for relief. It is the recommendation of this Court that it be denied.

**FINDINGS OF FACT AND CONCLUSIONS OF  
LAW ON APPLICANT'S CLAIM  
FOR RELIEF NO. 6  
(APPLICANT'S PLEADING, PAGE 9)**

In his sixth claim for relief the applicant contends that this Court denied him his right to confront witnesses under the Sixth Amendment to the United States Constitution by allowing for the admission of the testimony of Juan Gonzales.

[5]

The testimony in dispute is that which is the basis of applicant's fifth claim for relief.

**FINDINGS OF FACT**

An examination of the portion of the record in dispute reveals that no objection to the testimony of Gonzales was lodged on the basis that it constituted a violation of his right to confrontation under the Sixth Amendment. (R.R. 19-13 through 18).

**CONCLUSIONS OF LAW**

The alleged error was not raised at the time of trial through the imposition of an objection that the testimony amounted to confrontation right violation; it has been waived. *Martinez v. State*, 22 S.W.3d 504 (Tex. Crim. App. 2000). *Ethington v. State*, 819 S.W.2d 854 (Tex. Crim. App. 1991).

The sixth claim for relief raised by applicant is meritless. It is the recommendation of this Court, that it be denied.

***FINDINGS OF FACT AND CONCLUSIONS OF  
LAW ON APPLICANT'S CLAIM  
FOR RELIEF NOS. 7, 8, 9 AND 10  
(APPLICANTS PLEADING, PAGES 16 THRU 18)***

In his seventh claim for relief the applicant contends that this Court erred in allowing for the admission of inadmissible hearsay testimony, that being Juan Gonzales' testimony that applicant had said "something about being cool about snapping" the neck of the deceased.

In his eighth claim for relief the applicant complains of the admission of that same testimony of Juan Gonzales and characterizes the admission of the testimony as a violation of his constitutional right to due process of law.

[6]

In his ninth claim for relief the applicant contends that this Court erred in allowing for the admission of inadmissible hearsay testimony, that being Juan Gonzales' testimony that the applicant learned how to kill in prison.

In his tenth claim for relief the applicant complains of the admission of that same testimony of Gonzales and characterizes its admission as a violation of his constitutional right to due process of law.

***STATEMENT OF FACTS***

At no time during the course of the testimony of Gonzales did applicant object on the basis that the testimony amounted to a constitutional violation.

***CONCLUSIONS OF LAW***

The applicant's allegations that the hearsay rule was violated were considered and rejected on direct

appeal. *Trevino v. State*, 991 S.W.2d 849, 852 (Tex. Crim. App. 1999).

Inasmuch as these claims were raised and rejected on direct appeal, they cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

With respect to the applicant's constitutionally based allegations, it is sufficient to note that no objections of a constitutional nature was voiced at the time of trial. These claims are waived. See: *Martinez v. State*, 22 S.W.3d 504 (Tex. Crim. App. 2000); *Ethington v. State*, 819 S.W.2d (Tex. Crim. App. 1991).

The applicant's seventh, eighth, ninth and tenth claims for relief are devoid of merit. [7] The recommendation of this Court is that they be denied.

**FINDINGS OF FACT AND CONCLUSIONS  
ON THE APPLICANT'S CLAIM  
FOR RELIEF NUMBERS 11. 12. 13 AND 14  
(APPLICANT'S PLEADING, PGS. 19 AND 20)**

In his eleventh claim for relief the applicant contends that this Court erred, during the punishment phase, in admitting testimony from Juan Gonzales that Santos Cervantes said it "was neat about Carlos snapping her neck", because that testimony constituted hearsay.

In his twelfth claim for relief the applicant complains of the admission of that same testimony on the grounds that its admission resulted in a violation of his right to due process of law.

In his thirteenth claim for relief the applicant asserts that this Court erred, during the punishment phase, in admitting testimony from Juan Gonzales, that

the applicant stated that he "learned how to kill a person", because that testimony amounted to hearsay.

In his fourteenth claim for relief the applicant contends of the admission of that same testimony, on the grounds that its admission constituted a violation of his right to due process of law.

### *FINDINGS OF FACT*

During the course of the punishment phase of the trial the prosecution re-called Juan Gonzales as a witness. The following facts were adduced at that time:

[8]

Q: You are the same Juan Gonzales who testified during the first phase of the trial. Isn't that correct?

A: Yes, ma'am.

Q: All right. Juan, when you testified last you testified to some statements made by Carlos Trevino. Is that right?

A: Yes, ma'am.

Q: Now, were you instructed at that point that there was a portion of that statement that you were not allowed to go into because it was not relevant at that time?

A: Yes, ma'am.

Q: All right. So now, I want to direct your attention to when everyone came back up the hill after the murder of Linda Salinas and everyone was in the car and they were leaving the scene. Do you recall that?

A: Yes, ma'am.

Q: All right. Was there conversation between the other occupants of the car?

A: Yes, ma'am.

Q: All right. Could you tell the Jury, please, what was said and who said it?

A: That it was cool about—Santos said it was neat about Carlos snapping her neck.

Q: All right. And in response to that, what did Carlos say?

A: "I learned how to kill in prison."

Q: All right. What else did he say about his ability to use a knife?

A: That "I learned how to use a knife in prison," too.

Q: All right. How is Benito Soto DeLeon related to you?

A: He's my grandpa.

Q: All right. And that's where Carlos was living for a time when this incident occurred. Is that correct?

A: Yes, ma'am.

[9]

Q: Was he working then?

A: Yes, ma'am.

Q: What kind of work did he have?

A: He had—It was roofing—

Q: All right.

A: —with his mom's ex-boyfriend.



Q: All right. How long had he been staying at your grandfather's house?

A: For about a month or two.

Q: All right. Where had he been before that?

A: In prison.

(R.R. 23-83, 84,85)

### CONCLUSIONS OF LAW

The applicant's claims must fail for two reasons.

#### A.

The record reveals that *no* objection of any kind was lodged to the testimony at issue. The absence of an objection constitutes a waiver of these allegations. *Ibarra v. State*, 11 S.W.3d 189 (Tex. Crim. App. 1999), cert. den. \_\_\_ U.S. \_\_\_, \_\_\_ S. Ct. \_\_\_, \_\_\_ L. Ed. 2d \_\_\_, 2000 U.S. Lexis 5219 (October 2, 2000); *Fuentes v. State*, 991 S.W.2d 267 (Tex. Crim. App. 1999), cert. den. \_\_\_ U.S. \_\_\_, 145 L. Ed. 2d 420, 120 S. Ct. 541 (1999); *Dinkins v. State*, 894 S.W.2d 330 (Tex. Crim. App. 1995), cert. den. 516 U.S. 832, 116 S. Ct. 106, 133 L. Ed. 2d 59 (1995).

[10]

#### B.

The applicant's complaints must also fail because if an objection had been lodged it would have properly overruled, Gonzales' testimony regarding what the applicant said regarding learning to kill in prison was an admission by a party-opponent, and did not constitute hearsay as alleged by the applicant. Rule 801(e)(2), Tex. R. Evid.

With respect to Gonzales' testimony in which he related to what Santos Cervantes stated to the applicant shortly after the commission of the crime ("...it was

neat about [applicant] snapping her neck”), those statements were admissible on three theories. First, the statement was admissible as a hearsay exception because it was a statement describing an event while the declarant (Cervantes) was perceiving the event or shortly thereafter. *See*: Rule 803(1), Tex. R. Evid. Secondly, the statement was admissible because it did not constitute hearsay due to the fact that it was the statement of a party in the course and furtherance of the conspiracy. *See*: 801(e)(2)(E), Tex. R. Evid. Lastly, in the absence of some indication that statement was offered to prove what Cervantes asserted in the statement (the “neat” aspect of applicant’s action) was in fact the truth, the statement is not hearsay, hence it was admissible. *See*: Rule 801(d), Tex. R. Evid.

Applicant’s claims for relief eleven through fourteen are meritless. The recommendation of this Court is to deny relief.

[11]

***FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON APPLICANT’S CLAIMS  
FOR RELIEF NUMBERS 15 AND 16  
(APPLICANT’S PLEADING, PGS. 21 THRU 24)***

In his fifteenth claim for relief the applicant contends that the evidence is insufficient to support a finding of future dangerousness at the punishment phase<sup>3</sup>.

In his sixteenth claim for relief the appellant asserts that the insufficiency claimed above constitutes a

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<sup>3</sup> *See* Art. 37.07 1§2 (b)(1), Tex. Code Crim. Proc. Ann. (Vernon Supp. 2000).

violation of his right to due process of law under the United States Constitution.

These contentions were raised on direct appeal and rejected. *Trevino v. State*, 991 S.W.2d 849, 853, 854 (Tex. Crim. App. 1999).

Inasmuch as these claims were raised and rejected on direct appeal, they cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

The fifteenth and sixteenth claims for relief raised by the applicant provide no basis for granting relief. It is recommended that relief be denied.

**FINDINGS OF FACT AND CONCLUSIONS OF  
LAW ON APPLICANT'S CLAIMS  
FOR RELIEF NUMBERS 17 AND 18  
(APPLICANT'S PLEADING, PAGES 25 AND 26)**

In his seventeenth claim for relief the applicant contends that this Court erred, at the punishment phase, in admitting into evidence, testimony of Bob Morrill regarding a prison [12] gang and applicant's relationship thereto.

In his eighteenth claim for relief the applicant contends that the admission of the above-described evidence deprived him of his right to due process of law as guaranteed by the United States Constitution.

These claims were raised and rejected on direct appeal. *Trevino v. State*, 991 S.W.2d 849, 854 (Tex. Crim. App. 1999). The rejection of these claims on direct appeal precludes the applicant from obtaining relief in post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 499 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

Claims for relief seventeen and eighteen do not present any basis for granting relief. It is the recommendation of this Court that relief be denied.

***FINDINGS OF FACT AND CONCLUSIONS  
ON APPLICANTS CLAIMS FOR RELIEF  
NUMBERS 19 AND 20***

(APPLICANTS PLEADING, PAGES 27 THRU 31)

In his nineteenth claim for relief the applicant contends that the charge of the Court at the guilt phase of the trial erroneously allowed for a conviction on a theory or theories not alleged in the indictment.

In his twentieth claim for relief the applicant contends that the jury charge referred to above constitutes a due process violation in contravention to the United States Constitution.

***FINDINGS OF FACT***

The indictment in the instant case alleged in pertinent part as follows:

[13]

On or about the 10th day of JUNE, A.D., 1996, ROBERT CARLOS TREVINO, hereinafter referred to as defendant, did then and there intentionally and knowingly cause the death of an individual, namely: LINDA SALINAS, hereinafter referred to as complainant, BY CUTTING AND STABBING the said complainant WITH A DEADLY WEAPON, NAMELY A KNIFE, THAT IN THE MANNER OF ITS USE AND INTENDED USE WAS CAPABLE OF CAUSING DEATH AND SERIOUS BODILY INJURY, and the said defendant did then and there intentionally cause the death of the said LINDA SALINAS, while the defen-

dant was in the course of committing and attempting to commit AGGRAVATED SEXUAL ASSAULT upon the said LINDA SALINAS;

(C.R.1-2)

The jury charge provides in pertinent part:

Now, if you find from the evidence beyond a reasonable doubt that on or about the 10th day of June A.D., 1996 in Bexar County, Texas, the defendant, Carlos Trevino, did intentionally or knowingly cause the death of an individual, namely: Linda Salinas, by cutting or stabbing Linda Salinas with a deadly weapon, namely: a knife, that in the manner of its use or intended use was capable of causing death or serious bodily injury, and the defendant did intentionally cause the death of Linda Salinas while in the course of committing or attempting to commit the offense of aggravated sexual assault upon Linda Salinas, or

if you find from the evidence beyond a reasonable doubt that on or about the 10th day of June A.D., 1996 in Bexar County, Texas, the defendant, Carlos Trevino, acting together with any or all of the following: Bryan Apolinar, Santos Cervantes, Sienido Sam Rey or Juan Gonzales, did intentionally or knowingly cause the death of an individual, namely: Linda Salinas, by cutting or stabbing Linda Salinas with a deadly weapon, namely: a knife, that in the manner of its use or intended use was capable of causing death or serious bodily injury, and the defendant did intentionally cause the death of Linda Salinas while in the course of



committing or attempting to commit the offense of aggravated sexual assault upon Linda Salinas; or

if you find from the evidence beyond a reasonable doubt that on or about the 10th day of June A.D., 1996 in Bexar County, Texas, the defendant, Carlos Trevino, and any or all of the following: Bryan Apolinar, Santos Cervantes, Sienido Sam Rey or Juan Gonzales, entered into a conspiracy to commit Aggravated Sexual Assault on Linda Salinas, and that pursuant thereto they did [14] carry out, or attempt to carry out, such conspiracy to commit Aggravated Sexual Assault on Linda Salinas and that on or about the 10th day of June, A.D., 1996, in Bexar County, Texas, in the course of committing or attempting to commit Aggravated Sexual Assault on Linda Salinas, Bryan Apolinar, Santos Cervantes, Sienido-Sam Rey or Juan Gonzales intentionally or knowingly did cause the death of an individual, namely: Linda Salinas by cutting or stabbing Linda Salinas with a deadly weapon, namely a knife, that in the manner of its use or intended use was capable of causing death or serious bodily injury, and that Bryan Apolinar, Santos Cervantes, Sienido Sam Rey or Juan Gonzales did intentionally cause the death of Linda Salinas while in the course or committing or attempting to commit the offense of Aggravated Sexual Assault upon Linda Salinas, and that said offense was committed in furtherance of the conspiracy to commit Aggravated Sexual Assault of Linda Salinas and should have been anticipated by the defendant Carlos Trevino as a result of the



carrying out of the conspiracy, then you will find the defendant guilty of capital murder.

If you do not so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of capital murder and next consider whether the defendant is guilty of murder.

(C.R. 2-152, 153, 154)

The applicant advances the argument that by charging the jury on the law of parties<sup>4</sup> and party by conspiracy<sup>5</sup>, the trial Court committed a due process violation because neither of those theories of culpability were set forth in the indictment returned by the grand jury.

The argument advanced by the applicant has been consistently rejected by the Court of Criminal Appeals. *Goff v. State*, 931 S.W.2d 537 (Tex. Crim. App. 1996), cert. den. 520 U.S. 1171, 117 S. Ct. 1438, 137 L. Ed. 2d 545 (1997); *Montoya v. State*, 810 S.W.2d 160 (Tex. Crim. App. 1989), cert. den. 502 U.S. 961, 112, S. Ct. 426, 116 L. Ed. 2d 446 (1991).

[15]

The nineteenth and twentieth claims for relief are without merit. It is recommended that relief be denied.

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<sup>4</sup> See: Tex. Penal Code Ann §7.02(a) (Vernon 1994)

<sup>5</sup> See: Tex. Penal Code Ann. §7.02(b) (Vernon 1994)

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON APPLICANT'S CLAIMS  
FOR RELIEF NUMBERS 21 AND 22 (APPLI-  
CANT'S PLEADING, PAGE 32 THRU 36)**

In his twenty-first claim for relief, the applicant contends that the trial Court erred in failing to supply the jury with adequate instructions regarding the special issues, which are necessary prerequisites to a sentence of death.

In his twenty-second claim for relief, the applicant contends that, by failing to supply the jury with adequate instructions on the punishment phase special issues, he was denied due process of law, equal protection and is exposed to cruel and unusual punishment in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

**FINDINGS OF FACT**

At the conclusion of the punishment phase the applicant failed to object to the charge as given on the grounds now alleged. Moreover, no requested instructions were submitted and denied.

**CONCLUSIONS OF LAW**

The applicant's claim must fail for three separate reasons.

**A.**

The applicant cannot assert error on the basis of the trial Court's failure to submit a defensive issue, such as the definitions in question, without first requesting the instructions [16] or objecting to the trial Court's failure to submit the instructions. *Posey v. State*, 966 S.W.2d 57 (Tex. Crim. App. 1998).

## B.

Moreover, this claim has been raised and rejected on direct appeal, and as a result, it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1994). Inasmuch as these claims were raised and rejected on direct appeal they cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

## C.

Lastly, the applicant's claims that the terms in question need be defined has been rejected by the Court of Criminal Appeals. *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999); *Patrick v. State*, 906 S.W.2d 481, 494 (Tex. Crim. App. 1995), cert. denied, 517 U.S. 1106, 116 S. Ct. 1323, 134 L. Ed. 2d 475 (1995); *Burks v. State*, 876 S.W.2d 877, 910-11 (Tex. Crim. App. 1994), cert. denied, 513 U.S. 1114, 115 S. Ct. 909, 130 L. Ed. 2d 791 (1995); *Boyd v. State*, 811 S.W.2d 105 (Tex. Crim. App. 1991); *Camacho v. State*, 864 S.W.2d 524 (Tex. Crim. App. 1993). See also: *Green v. Johnson* 160 F.3d 1029 (5th Cir. 1998), \_\_ U.S. \_\_, 119 S. Ct. 1107, 143 L. Ed. 2d 106 (1999).

The applicant's twenty-first and twenty-second claims for relief are meritless, they should be denied.

[17]

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON APPLICANT'S CLAIM  
FOR RELIEF NO. 23  
(APPLICANT'S PLEADING, PG. 37)**

In his twenty-third claim for relief the applicant contends that Art. 44.251(a), Tex. Code Crim. Proc. Ann. (Vernon Supp. 2000), when interpreted in conjunction with Art. 37.071§2(e), *id.*, is facially unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

This contention has been rejected by the court of Criminal Appeals. *Cockrell v. State*, 933 S.W.2d 73 (Tex. Crim. App. 1996); *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996); *Lawton v. State*, 913 S.W.2d 542 (Tex. Crim. App. 1995).

Moreover, this claim has been raised and rejected on direct appeal. As a result, it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1999). Inasmuch as this claim was raised and rejected on direct appeal, it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

This claim does not warrant the granting of relief. It is recommended that relief be denied.

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON APPLICANT'S CLAIM  
FOR RELIEF NO. 24  
(APPLICANT'S PLEADING, PG. 39)**

In his twenty-fourth claim for relief, the applicant contends that the due process clause [18] of the Four-

teenth Amendment to the United States Constitution requires the Court of Criminal Appeals to engage in "proportionality review" in death penalty cases.

This claim must fail for two independent reasons.

#### A.

First, this claim has been raised and rejected on direct appeal. As a result it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1999). Inasmuch as these claims were raised and rejected on direct appeal, they cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

#### B.

Secondly, this argument has been considered and rejected by the Court of Criminal Appeals. *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999); *Anderson v. State*, 932 S.W.2d 502 (Tex. Crim. App. 1996), cert. den. 521 U.S. 1122, 117 S. Ct. 2517, 138 L. Ed. 2d 1019 (1997).

The applicant's twenty-fourth claim for relief is without merit. It is recommended that relief be denied.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICANT'S CLAIM FOR RELIEF NO. 25 (APPLICANT'S PLEADING, PG. 41)**

In his twenty-fifth claim for relief the applicant contends that the definition of [19] "mitigating evidence" set forth in the capital sentencing statute is violative of the Eighth Amendment to the United States Constitution because it limits "mitigation" to factors that reduce the defendant's "moral blameworthiness".

This claim must fail for three reasons.

A.

No objection to the definition in question was raised in the trial Court. As a result, the issue is not subject to post-conviction review. *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996), cert. den. 519 U.S. 1119, 117 S. Ct. 966, 136 L. Ed. 2d 851 (1997).

B.

Moreover, this claim has been raised and rejected on direct appeal and as a result, it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1999). Inasmuch as these claims were raised and rejected on direct appeal, they cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

C.

Finally, the claim must fail because it has been rejected by the Court of Criminal Appeals *Cockrell v. State*, 933 S.W.2d 73 (Tex. Crim. App. 1996), cert. den. 520 U.S. 1173, 117 S. Ct. 1442, 137 L. Ed. 2d 548 (1997).

[20]

The applicant's twenty-fifth claim for relief is without merit. It is recommended that relief be denied.



**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON APPLICANT'S CLAIM  
FOR RELIEF NO. 26  
(APPLICANT'S PLEADING, PG. 44)**

In his twenty-sixth claim for relief, the applicant contends that Art. 37.071 §2(e), *supra*, is violative of the Eighth and Fourteenth Amendments to the United States Constitution because it permits open-ended discretion contrary to the holding of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

This claim has been considered and rejected by the Court of Criminal Appeals, *Pondexter v. State*, 942 S.W.2d 577 (Tex. Crim. App. 1996), cert. denied, 522 U.S. 825, 118 S. Ct 85, 139 L. Ed. 2d 42 (1998); *Shannon v. State*, 942 S.W.2d 591 (Tex. Crim. App. 1998).

Additionally, this claim has been raised and rejected on direct appeal. As a result it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1999). Inasmuch as this claim was raised and rejected on direct appeal, it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

It is recommended that this claim for relief be denied.

[21]

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON APPLICANT'S CLAIM  
FOR RELIEF NO. 27  
(APPLICANT'S PLEADING, PG. 47)**

In his twenty-seventh claim for relief the applicant contends that Art. 37.071 § 2(e), Tex. Code Crim. Proc. Ann (Vernon Supp. 2000) is unconstitutional under the United States Constitution because it fails to place the burden of proof on the prosecution.

In accordance with the statute, the jury was instructed that the State bore the burden of proof on the issue of whether or not the defendant would commit criminal acts of violence that would constitute a continuing threat to society. (C.R. 2-177) *See*: Art. 37.071 § 2, *supra*. The jury instructions allocated no burden of proof regarding the "mitigating evidence" special issue. The applicant characterizes this as an Eighth Amendment violation. The Court of Criminal Appeals has ruled to the contrary. *Raby v. State*, 970 S.W.2d 1 (Tex. Crim. App. 1998), cert. den 525 U.S. 1003, 119 S. Ct. 515, 142 L. Ed. 2d 427 (1998); *Barnes v. State*, 876 S.W.2d 316 (Tex. Crim. App. 1994), cert. den. 513 U.S. 861, 115 S. Ct. 174, 130 L. Ed. 2d 110 (1994).

Moreover, this claim has been raised and rejected on direct appeal. As a result it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1999). Inasmuch as this claim was raised and rejected on direct appeal, it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

[22]

This claim is without merit. It is the recommendation of this Court that relief be denied.

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON APPLICANT'S CLAIM  
FOR RELIEF NO. 28  
(APPLICANT'S PLEADING, PG. 49)**

In his twenty-eighth claim for relief the applicant contends that the Texas death penalty sentencing scheme is unconstitutional under Art. I, § 13 of the Texas Constitution.

This claim has been raised and rejected on direct appeal. As a result, it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1999). Inasmuch as this claim was raised and rejected on direct appeal, it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

Moreover, applicant's claim must fail due to the absence of any authority which serves to support his theory that the Texas Constitution has been violated. *Jones v. State*, 944 S.W.2d 642 (Tex. Crim. App. 1996), cert. den. 522 U.S. 832, 118 S. Ct 100, 139 L. Ed. 2d 54 (1997).

The applicant's claim should be rejected.

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON APPLICANT'S CLAIM  
FOR RELIEF NO. 29  
(APPLICANT'S PETITION, PG. 49)**

In his twenty-ninth claim for relief, the applicant contends that the death penalty, as it [23] is presently administered, amounts to cruel and unusual punishment and violates the Eighth and Fourteenth Amendments to the United States Constitution.

This claim amounts to a "facial challenge" to the constitutionality of the Texas death penalty scheme, and relies solely on Justice Blackmun's dissenting opinion in *Callins v. Collins*, 510 U.S. 1141, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994).

This claim must fail because it has been expressly rejected by the Court of Criminal Appeals. *Ladd v. State*, 3 S.W.3d 547 (Tex. Cri. App. 1999); *Chamberlain v. State*, 998 S.W.2d 239 (Tex. Crim. App. 1999).

The claim presents nothing warranting relief; it should be denied.

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON APPLICANT'S CLAIM  
FOR RELIEF NO. 30  
(APPLICANT'S PETITION, PG. 50)**

In his thirtieth claim for relief, the applicant contends that the Texas capital murder sentencing scheme is violative of the Eighth Amendment because it prevents the jury from becoming aware that a single hold-

out juror on one of the special issues would result in the imposition of a life sentence.<sup>6</sup>

This claim has been raised and rejected on direct appeal. As a result, it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1999). Inasmuch as this claim was raised and rejected on direct appeal, it cannot form the basis for relief in a post-conviction writ of habeas corpus. *Ex Parte Torres*, [24] 943 S.W.2d 469 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984).

Moreover, this claim is foreclosed by the holdings of the Court of Criminal Appeals. *See, e.g., Shannon v. State*, 942 S.W.2d 591 (Tex. Crim. App. 1996); *Lawton v. State*, 913 S.W.2d 542 (Tex. Crim. App. 1995), *cert. den.* 519 U.S. 826, 117 S. Ct. 88, 136 L. Ed. 2d 44 (1997); *Davis v. State*, 782 S.W.2d 211 (Tex. Crim. App. 1989), *cert. denied*, 495 U.S. 940, 110 S. Ct. 2193, 109 L. Ed. 2d 520 (1990).

The applicant's thirtieth claim for relief is without merit. It is the recommendation of this Court that relief be denied.

**FINDINGS OF FACT AND CONCLUSIONS OF  
LAW ON APPLICANT'S CLAIMS FOR RELIEF  
NUMBERS 31, 32, 33, 34, 35, 36, 37 AND 38  
(APPLICANTS PLEADINGS, PAGES 52  
THROUGH 63)**

In his claims for relief thirty-one through thirty-eight, the applicant contends that he was denied effec-

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<sup>6</sup> *See*: Tex. Code Crim. Proc. Ann. Art. 37.071 § 2(a) (Vernon Supp. 2000)

tive assistance of counsel at the guilt phase of his trial in violation of Art. I, § 10 of the Texas Constitution and the Sixth Amendment to the United States Constitution.

### STANDARD OF REVIEW

The Constitutional standard for determining whether a criminal defendant has been denied the effective assistance of counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in the case of *Strickland v. Washington*:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This [25] requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

The *Strickland* analysis has been expressly adopted by the Court of Criminal Appeals. *Butler v. State*, 872 S.W.2d 227 (Tex. Crim. App. 1994), cert. den. 513 U.S. 1157, 115 S. Ct. 1115, 130 L. Ed. 2d 1079 (1995); *Holland v. State*, 761 S.W.2d 307 (Tex. Crim. App. 1988), cert. den. 489 U.S. 1091, 109 S. Ct. 1560, 103 L. Ed. 2d 863 (1989).



In order to establish that his trial counsel's performance was constitutionally infirm, the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Darden v. Wainwright* 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *Chambers v. State*, 903 S.W.2d 21 (Tex. Crim. App. 1995); *Banda v. State*, 890 S.W.2d 42 (Tex. Crim. App. 1994), cert. den. 515 U.S. 1105, 115 S. Ct. 2253, 132 L. Ed. 260 (1995). The applicant bears the burden of proof on this issue and must defeat a strong presumption that the performance of trial counsel falls within a wide range of reasonable legal assistance. *Patrick v. State*, 906 S.W.2d 481 (Tex. Crim. App. 1995), cert. den. 517 U.S. 1106, 116 S. Ct. 1323, 134 L. Ed. 2d 475 (1996); *Garcia v. State*, 887 S.W.2d 862 (Tex. Crim. App. 1994), cert. den. 514 U.S. 1021, 115 S. Ct. 1368, 131 L. Ed. 2d 223 (1995). Reviewing courts are required to review the performance of counsel from counsel's perspective at the time he acted (or failed to act) rather than through the use of hindsight. *Ex Parte Kunkle*, 852 S.W.2d 499 (Tex. Crim. App. 1993); cert. den. 510 U.S. 840, 114 S. Ct. 122, 126 L. Ed. 2d 87 (1994); *Solis v. State*, 792 S.W.2d 95 (Tex. Crim. [26] App. 1990). A reviewing Court is not entitled to speculate as to the reasons why trial counsel acted as he did, rather a reviewing court must presume that the actions were taken as part of a strategic plan for representing the client. *Young v. State*, 991 S.W.2d 835 (Tex. Crim. App. 1999); *Jackson v. State*, 877 S.W.2d 768 (Tex. Crim. App. 1994). The record must affirmatively demonstrate the alleged Sixth Amendment violation. *Thompson v. State*, 9 S.W.3d 808 (Tex. Crim. App. 1999).

In reviewing claims of ineffective assistance of counsel, the standard to be applied is whether an accused received "reasonably effective" assistance.

*Brewer v. State*, 649 S.W.2d 628 (Tex. Crim. App. 1976); *Ex Parte Gallegos*, 511 S.W.2d 510 (Tex. Crim. App. 1974). The sufficiency of assistance is to be gauged by the totality of representation and the fact that another attorney may have pursued a different tactic at trial is insufficient to prove a claim of ineffective assistance of counsel. *Archie v. State*, 615 S.W.2d 762 (Tex. Crim. App. 1981). In reviewing the question of whether counsel was "reasonably effective", under the deficient performance prong of the *Strickland* test, the reviewing court is required to determine whether counsel's alleged errors were so egregious that counsel was not functioning in a manner envisioned by the Sixth Amendment. *Gosch v. State*, 829 S.W.2d 775 (Tex. Crim. App. 1991), cert. den. 509 U.S. 922, 113 S. Ct. 3035, 125 L. Ed. 2d 722 (1993).

The prejudice which compromises the second component has also been defined. The Supreme Court has stated that "the defendant must show that there is a reasonable probability [27] that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington, supra*, at S. Ct. 2069, 2070. In sum, if no prejudice had been demonstrated, then the Sixth Amendment right to counsel has not been violated.

The applicant has the burden of affirmatively proving prejudice. *Strickland v. Washington, supra*, at S.Ct. 2067; *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996); cert. den. 519 U.S. 1119, 117 S. Ct. 966, 136 L. Ed. 2d 851 (1997). The prejudice envisioned by *Strickland* requires a showing of more than an error which might have had a conceivable effect on the outcome of the trial. *Strickland v. Washington, supra*, at S.Ct. 2067. The prejudice prong established by *Strickland* mandates a demonstration of a reasonable prob-

ability that counsel's unprofessional error, or errors, were of such magnitude as to undermine confidence in the outcome of the trial. *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

The applicant has delineated five alleged failures on the part of trial counsel at the guilt phase, which he claims meet both prongs of the *Strickland* test. These complaints will be addressed in the order in which they were asserted by the appellant.

A.

In his initial assertion of ineffectiveness on the part of trial counsel, it is claimed that trial counsel was insufficiently prepared to cross-examine a prosecution witness on the issue of "D.N.A. testing". (Petition, pg. 55)

The applicant was granted an evidentiary hearing in order to bring forth proof as to [28] how this alleged failure on the part of trial counsel amounted to a Sixth Amendment violation.

During the course of that hearing, trial counsel explained that he had sought and obtained an expert witness on the subject of D.N.A. testing prior to trial. (W.R.-51) Trial counsel was unaware of any facts that would have demonstrated that the conclusions of the State's witness as trial were incorrect.<sup>7</sup> (W.R.-49) Moreover, according to trial counsel, the fact that certain forensic evidence linked him to the victim was not inconsistent with the applicant's version of the events

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<sup>7</sup> The State's witness was of the opinion that the applicant could not be excluded as the donor of the D.N.A. sample found on the victim. (R.R. 19-98 thru 133)

which led to the victim's death. (W.R.- 47, 48, 49) At no time was it demonstrated that trial counsel performed deficiently regarding the State's D.N.A. expert. Moreover, it has not been shown that applicant was in any fashion prejudiced by trial counsel's actions vis-a-vis this aspect of the prosecution's case. The evidence at trial circumstantially linked the applicant to the offense. Nothing presented since the trial's conclusions in any way serves to cast doubt on the veracity of that testimony.

The applicant has failed to meet his burden under either prong of *Strickland*.

B.

In his second contention regarding trial counsel's performance, the applicant takes issue with counsel for failing to object to the trial Court's granting of a State's challenge for cause on venireperson Michael Conlan (R.R. 4-32, 33). The applicant has wholly failed to demonstrate how trial counsel's failure to object served to prejudice him.

If an objection would have been made, *at best* an issue would have been preserved for [29] purposes of appellate review, assuming it would have been overruled.

In any event, the applicant has failed to demonstrate how the jury which ultimately decided his guilt and punishment was something short of a lawfully constituted jury. Without such a showing, it cannot be said that trial counsel's omission prejudiced the applicant in any fashion. *Brooks v. State*, 990 S.W.2d 278 (Tex. Crim. App. 1999); *Jones v. State*, 982 S.W.2d 386 (Tex. Crim. App. 1998).

## C.

In his third specification of error on the part of trial counsel, applicant faults counsel for failing to object to certain testimony of Juan Gonzales wherein the jury was informed of the contents of certain statements attributed to the applicant. The testimony of Gonzales was not inadmissible, applicant's complaints notwithstanding.<sup>8</sup> The failure to secure the exclusion of relevant and competent evidence does not constitute ineffective assistance under *Strickland's* first prong. See: *Gosch v. State, supra*.

The eight claims for relief based upon allegations of ineffective assistance of counsel at the guilt stage are meritless; relief should be denied.

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON APPLICANT'S CLAIMS  
FOR RELIEF NUMBERS 39, 40, 41, 42, 43 AND 44  
(APPLICANT'S PLEADING, PAGES 67 THRU 74)**

In five claims for relief the applicant claims he was denied his right to effective [30] assistance of counsel at the punishment phase of his trial in violation of the Sixth Amendment to the United States Constitution and Art. I § 10 of the Texas Constitution.

**STANDARD OF REVIEW**

In analyzing claims of ineffective assistance of counsel alleged to have occurred during the punishment phase of a capital murder trial, a reviewing court is required to employ the *Strickland v. Washington* two-

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<sup>8</sup> See: Findings of Fact and Conclusions of Law On Applicant's Claims For Relief, Numbers Five Through Fourteen.



prong test. *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999).

The applicant asserts that counsel was ineffective for once again not seeking to exclude the testimony of Juan Gonzales in which he related certain statements made by the applicant.

The applicant has failed to demonstrate how those statements were inadmissible. His failure to so demonstrate amounts to a failure to meet his burden of proof on the first prong of *Strickland v. Washington*.

The applicant also asserts that trial counsel performed deficiently by failing to secure the exclusion of the testimony of Bob Morrill regarding applicant's history of involvement with a prison gang.

Again, the applicant has not succeeded in showing why that testimony was inadmissible. That failure of proof is fatal under the first prong of *Strickland v. Washington*.

Applicant's claims for relief thirty-nine through forty-four are completely lacking in merit; they should be denied.

[31]

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON APPLICANT'S CLAIMS  
FOR RELIEF, NUMBERS 45 AND 46  
(APPLICANT'S PLEADING, PAGES 75 THRU 80)**

In his final two claims for relief, the applicant asserts that he was denied his right to effective assistance of counsel as guaranteed by the Texas and United States Constitution because trial counsel failed to object to the trial Court's inclusion in the jury charge an application paragraph authorizing a conviction under



the law of parties or party by conspiracy. (See: Findings Of Fact And Conclusions Of Law Claims For Relief, Nos. 19 and 20).

The applicant's claim has a flawed foundation in that it assumes, erroneously, that the law of parties must be alleged in the indictment or it cannot be placed in the jury instructions. That is not the case. See: *Goff v. State, supra*; *Montoya v. State, supra*.

The charge was not objectionable on the grounds now alleged. It cannot be said that counsel was ineffective for failing to lodge a meritless objection: *Gosch v. State, supra*.

The applicant's final two allegations regarding the legality of his conviction are baseless, their denial is recommended.

[32]

### CONCLUSION

None of the claims presented by the applicant warrant the granting of any manner of relief. It is the recommendation of this Court that all relief be denied.

### ORDERS OF THE COURT

The District Clerk of Bexar County, Texas is hereby ordered to prepare a copy of this document, together with any attachments and forward the same to the following persons by mail or by practical means:

- a) The Court of Criminal Appeals  
Austin, Texas 78711
- b) Ms. Susan Reed  
Criminal District Attorney  
Bexar County Courthouse  
San Antonio, Texas 78205

- c) The Office of John Cornyn  
Attorney General of Texas  
Enforcement Division  
Capitol Station  
Austin, Texas 78711
- d) Carlos Trevino No. 999235  
12002 S. FM 350  
Livingston, Texas 773 51
- e) Albert L. Rodriguez  
1919 San Pedro  
San Antonio, Texas 78212

SIGNED, ORDERED, and DECREED this 6 day of  
Dec, 2000.

/s/ Sharon MacRae  
Sharon MacRae  
296<sup>th</sup> District Court  
Bexar County, Texas

**EXHIBIT 9**

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

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**CIVIL ACTION NO. SA-01-CA-306-FB**

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**CARLOS TREVINO,**

*Petitioner*

*v.*

**JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT  
OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,**

*Respondent*

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**[STAMP:**

**FILED**

**JUL 31 4 00 PM '02**

**[illegible]]**

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***MOTION TO WITHDRAW AS ATTORNEY FOR  
PETITIONER***

**TO THE HONORABLE JUDGE OF THE COURT:**

Now comes Albert L. Rodriguez, court appointed counsel for Petitioner, and files this motion to withdraw as attorney fo record.

Counsel was appointed on April 13, 2001. The Petition for Writ of Habeas Corpus and memorandum of law was timely filed, however, no hearing has been set by the Court at this time.

A response to Respondent's Motion for Summary Judgment is due September 6, 2002.

Counsel has conferred with Mr. Rick Broughton, Assistant Attorney General, Capital Litigation Division, and he has no opposition to this motion.

Over the last few years counsel has become progressively ill from a thyroid condition, diabetes, hypertension, and mental stress and depression from all of the above. Counsel is taking the following daily medications: Synthroid, Cartia, Glucophage, and Zoloft. Dr. Jose Sanchez has strongly urged that counsel discontinue death penalty writ cases as they greatly aggravate his existing medical condition.

It is requested that the Court allow Albert L. Rodriguez to withdraw as attorney and that a new attorney be appointed to represent Mr. Carlos Trevino in all further proceedings.

Respectfully submitted,

Law Office of Albert L. Rodriguez  
110 Sprucewood  
San Antonio, Texas 78216  
(210) 828-1243  
(210) 805-0636 (fax)

By: /s/ Albert L. Rodriguez  
Albert L. Rodriguez  
Texas Bar Number 17140400  
Attorney for Petitioner

### ***CERTIFICATE OF SERVICE***

I certify that I mailed a copy of the Motion to Withdraw as Attorney for Petitioner to Mr. J. Richard Broughton, Assistant Attorney General, on 7/31, 2002.

By: /s/ Albert L. Rodriguez  
Albert L. Rodriguez

**EXHIBIT 15****SWORN AFFIDAVIT OF MARIO TREVINO****STATE OF TEXAS §****COUNTY OF BEXAR §**

My name is Mario Trevino and I was the lead trial counsel for Carlos Trevino in his capital murder case. Gus Wilcox was my second chair. Ed Villanueva was our investigator. Although I had tried several capital murder cases before, sitting as second chair, I was lead counsel in this case.

At the time of the trial I had never attended any specialized training for capital murder defense. However, I have attended the week long advanced criminal case seminars sponsored by the State Bar of Texas.

From the beginning of my representation of Carlos I saw problems with this case. The mere facts of the rape/murder of a young girl coupled with the fact Carlos was on parole at the time and was a gang member led me to believe he could very well be given the death penalty.

I approached Robert (Mac) McClure, the head of the felony section and sought to obtain a plea bargain agreement to save Carlos' life. At first Mac agreed to a life sentence if Carlos agreed to testify against his co-defendant. Carlos did not accept.

Mac agreed to let Carlos plead to a term of life and Carlos agreed.

We all met at the Courthouse to sign the paperwork but Carlos had a change of mind. Carlos seemed livid. His eyes were "angry". I believe he received some communication in the jail from his fellow Her-

manos Pistaleros (HPL) gang members telling him not to take the deal.

I did not ask anyone to assist me in trying to get Carlos to take the plea bargain.

After that the case was indicted and the State's attorneys Tessa Herr and Tyldon Schaffer took over. Although Tessa Herr, now Judge of the 186<sup>th</sup> District Court was first chair Tyldon Schaffer was taking control of the case and he was not going to plea bargain this case away.

We did not ask for any experts in this case other than to check the DNA results.

In hindsight, we should have gotten mitigation expert to do a psycho-social history of Carlos' life. But mitigation experts were not used very much at the time of the trial (1997 in Bexar County).

I did know his mother was around but we never could connect. I believe she lived somewhere near Bastrop, Texas. I heard she was in the courthouse one time but I never did talk with her.

In hindsight, I should have asked for an expert on fibers. The State's expert hurt our case without anyone to combat this testimony.

I believe that was a very difficult case to defend because of the very facts of the case, gang rape and subsequent murder of a teenage girl. In addition he was on adult parole for unauthorized use of a motor vehicle and he was in a prison gang.

I did not think about getting an expert on prison violence nor on prison gangs.



/s/ Mario A. Trevino

MARIO TREVINO

315 S. Main Ave

San Antonio, Texas 78204-1016

Phone (210) 226-0026

State Bar NO. 20211250

Court Appointed Attorney for  
Carlos Trevino at trial

STATE OF TEXAS §

COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, on this day personally appeared MARIO TREVINO, known to me to be the person whose name is subscribed to the foregoing statement and, being by me first duly sworn, upon oath declared that the statements contained therein are true and correct.

/s/ Mario A. Trevino

MARIO TREVINO

Subscribed and sworn to before me this 6<sup>th</sup> day of November, 2003 A.D. to certify which witness my hand and seal of office.

/s/ Melissa Gomez

Notary Public

[STAMP:

MELISSA GOMEZ

Notary Public, State of Texas

My Commission Expires

March 11, 2007]

**EXHIBIT 16**

STATE OF TEXAS     X  
                             X

**AFFIDAVIT**

My Name is Carlos Treviño TDCJ No. 999235

I was convicted of capital murder by a jury on July 3, 1997.

Before my trial started, my attorney Mr. Mario Treviño came to me with a plea bargain for a forty (40) year sentence. He told me that I would have to testify against the others that were also/been charged with the murder. I did not want to testify.

He later came back to me that I would not have to testify. He told me that I would still get a forty (40) year sentence.

When we went to the D.A.'s office to sign the paperwork, I saw that it was for a Life Sentence, and that I wouldn't be able to see parole until forty (40) years. He had told me a life sentence was 30 years.

I was mad with my attorney for not telling me the truth. He wanted to mess me over. I did not trust him. At that point I had only seen him twice.

If my attorney had explained to me the terms of a Plea bargain, if he had brought one or more of my family members to explain the fact that being alive for sure was better than risking the chance to get the death penalty, if he had explained that taking the life plea meant that I would be around for my children, my wife and my family, I would have chosen life and would have not gone to trial.

SWORN TO AND SIGNED by the affiant on this day  
11 day of June, 2004

/s/ Carlos Treviño  
Carlos Treviño

Sworn to and subscribe before me by the said Carlos  
Treviño on this the 11 day of June, 2004

/s/ Christy Putnam  
Notary Public and for the State of Texas  
My commission expires 01-27-2008

[STAMP:

CHRISTY PUTNAM  
NOTARY PUBLIC STATE OF TEXAS  
My Commission Expires: 01/27/2008  
Notary without Bond]

**EXHIBIT 19****SWORN STATEMENT OF  
JUANITA TREVINO DELEON**

STATE OF TEXAS §

COUNTY OF BEXAR §

My name is JUANITA TREVINO DELEON. I live at XXXX, San Antonio, Texas 78207. My telephone number is XXXX. My date of birth is XXXX/73.

I can read and write the English language.

Carlos Trevino is my nephew and I have known him all of my life. Carlos' mother, Josephine Trevino would go out drinking regularly. His father, Peter Trevino was not around much. His real, biological father is unknown.

Carlos was was hit by a car while crossing the Flores street. This happened in 1986 or 1987. He was living on Sayers Street.

One time Carlos took me to the carnival. We rode on the "thunderbolt" ride. It was the first ride we got on. The next thing I knew I was covered in blood. Carlos' nose started to bleed. He would get frequent nose bleeds after the car accident. The would just start on their own. Carlos would put toilet paper up his nose and hold his nose back to get it stop bleeding.

Carlos was a hard worker. He worked for Ruben Gonzales. He worked for Ruben after he got out of prison the first time.

Janet Cruz is the mother of Carlos' children, Julio and Carlos, Jr.

I am very close to Carlos. My mother passed away when I was 12 years old. I could tell Carlos anything. I told him about my first crush on a boy. I told him about a lot of things. I trusted him. I would tell him if I had any problems with my boyfriend Mario (Cantu). I trust him. I love him.

One time I talked Carlos into skipping school.

When he lived on Dahlia Walk his mother would just leave, abandoning him.

We would go to Normoyle Park. We would go with his uncles. In the summertime Carlos liked to go swimming. He would play board games such as "Connect 4", "Sorry" and "Kootie". He also enjoyed arts and crafts. He would also play basketball and volleyball.

I remember the first time Carlos got I trouble with Mario Cantu and Albert Cantu. They were on the roof of of Lowell Middle School. The others left leaving Carlos behind. Carlos did not run. Mario told me about this incident. Mario did not get into trouble.

Juanita would always talk Carlos into going to the park at night at 9 or 10 p.m. when he was not supposed to. Carlos would say that he was going out to see Mario instead of Juanita.

In the summer of 1993, Mario talked Carlos into going to 1604 South. They went swimming. By doing this they left Janet and me locked out of the house. When they came back they both smelled like the river. They "stunk like fish". They said that "... they had gone to the store". I was mad at Mario but I could not get mad at Carlos.

The day I came to court to testify at Carlos's trial I met with attorney Mario Trevino in the cafeteria . He

told me just to say what we talked about in the cafeteria and not to add anything else.

STATE OF TEXAS §

COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, on this day personally appeared JUANITA TREVINO DELEON, known to me to be the person whose name is subscribed to the foregoing instrument and, being by me first duly sworn, upon oath declared that the statements contained therein are true and correct.

/s/ Juanita Trevino DeLeon  
JUANITA TREVINO DELEON

Subscribed and sworn to before me this 30 day of June, 2003 A.D. to certify which witness my hand and seal of office.

/s/ Melissa Gomez  
Notary Public

[STAMP:

MELISSA GOMEZ  
Notary Public, State of Texas  
My Commission Expires  
March 11, 2007]



STATE OF TEXAS                   §  
COUNTY OF BEXAR               §

1. My name is Ann Matthews. I have a Bachelors of Arts degree in Social Studies with a specialization in Psychology from Sul Ross State University, and have been a Mitigation Specialist in Texas since 2001.

2. As a Mitigation Specialist, I work with the capital trial team to develop a bio/psycho/social history of the client, to interview relevant family, friends and others who are suggested by the client's history, collect relevant records that are indicated by the client's history and assist the trial team in developing possible theories and themes of mitigation that may be presented during the guilt/innocence and penalty phases of a capital trial.

3. The American Bar Association's *Guidelines in Death Penalty Representation* (ABA Guidelines) provide in part:

The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence to rebut any aggravating evidence that may be introduced by the prosecutor

*ABA Guideline 11.41(B)*

4. I have done an initial mitigation review of Carlos Trevino. I have written a social history report, had family interviews and reviewed numerous items provided by the attorneys.

5. It is my understanding that no mitigation research was done in preparation for the trial level of Carlos Trevino's Capital Murder. Further no research was done until I was asked to look into the case. Due to the unfortunate time lapse, several of the family members have past away, and many of the records that would support Carlos' s descriptions of his life are fading. The optimum time to have researched this life was while the records and memories were fresh. The trial attorneys had access to the closest view of Carlos's actual family life, and they chose not to preserve or use that invaluable information.

6. It is my opinion based on the results I have had in other cases, and the current trends in mitigation that had Carlos Trevino been adequately represented at trial, and his life story come out for the jury, he would not be on death row. Much of Carlos life was dictated to him by adults that were unfit to parent. This family life forced him to make adult choices with out the benefit of appropriate training or maturity. These decisions directly lead him to be in a car of men that were subsequently charged with capital murder. Horribly, his legal representation followed his parents model; Carlos was the only member of the party that was tried for Capital Murder. Because of the insufficient case presentation during sentencing, he is now facing death by the state.

7. It is my opinion that if Carlos were given the opportunity to either be re-tried or re-sentenced, the out

come would be entirely different. I do not feel that a jury that is shown Carlos's complete life history could decide that he should be executed.

Further, affiant sayeth not.

Sworn to and signed by the affiant on this the 13<sup>th</sup> day of January, 2004.

/s/ Ann Matthews

Ann Matthews

Sworn to and subscribed before me the said Ann Matthews on this the 13<sup>th</sup> day of January, 2004.

/s/ Jane McRoberts Cobb

Notary Public in and for the State at Large  
My Commission expires \_\_\_\_\_

[STAMP:

Jane McRoberts Cobb  
Notary Public  
State of Texas  
My Commission Expires  
MAY 27, 2004]

Social History Report  
CARLOS TREVINO

Introduction:

This social history report is intended for use in the process of appealing Mr. Trevino's death conviction from 1998. The information was collected through interviews with Mr. Trevino's family members, his attorneys, reviewing interview reports and transcripts of interviews with Mr. Trevino, school and medical records, and writings by Mr. Trevino. Also reviewed were the psychological assessments of Mr. Trevino by Brown, Nelson, Frank and Associates of Houston who assessed Mr. Trevino in 1998.

Life History:

To begin the social history of Carlos Trevino, it is important to review the family background prior to his birth. Josephine Deleon Trevino, Carlos Trevino's mother was born in 1957. Her parents divorced when she was 4 years old, the children then went to live with the father's mother. Benito Deleon started physically/sexually-molesting Josephine when she was 5 years old; and he continued to do so, regularly, until she was 12 years old. Josephine tried to tell her step-mother, but was told the abuse was her fault.

Josephine's natural mother died of cancer when she was 10-years old. Josephine went to school until she was in the 7th grade. When she was 14 years old her father tried to rape her. Josephine began drinking heavily and acting out sexually.

Carlos Trevino was born XXXX, 1975 in San Antonio. He was the oldest child of Josephine Deleon and Horacio Trevino. Carlos weighed four pounds at birth and had to remain in the hospital for a couple of weeks

to gain enough weight to be safely viable. Josephine Trevino reports that she drank heavily during the pregnancy, and was not available for early bonding. Carlos's father Horacio returned to Mexico prior to his birth and has not been seen by the family since.

Josephine soon met Peter Sanchez. XXXX, 1977 Peter Anthony Deleon Trevino was born. XXXX, 1978 Elizabeth Deleon Trevino was born however, on January 5, 1979 she died; the family was told that she died of AIDS. Josephine reports drinking heavily during these pregnancies as well.

Carlos has memories of being terrified of the violent fights between his mother and her boyfriends. Drinking and drug use was prevalent in the home. Carlos reports memories of being left in the car while his mother was in bars, though she denies these reports and says they were always safely left with either her sister Irena or Janie.

In 1981 Carlos hit his face on a piano in the home and has had unexplained nose bleeds ever since. About the same time Carlos reports having two cousins that lived nearby kill in separate stabbings. He saw one car covered in blood from one of the victims. Carlos reports feeling scared and confused. Later that year, the 15 year old boy next door died of a cocaine overdose.

XXXX, 1982 Carlos's sister Jennifer was born.

In 1984 a car hit Carlos in front of his home. He was hospitalized due to hitting his head on a utility pole. The next year Josephine and Peter Sanchez had their final fight, she had her father come pickup the kids, got drunk with the neighbors, and left Peter. In the next six years, Carlos and his family lived with

various relatives and periodically lived in the car or at the park off San Pedro Road.

Carlos reports starting to smoke pot and drinking beer 1986. He learned to drive in 1987 while Josephine was in Mexico with then boyfriend Julian. The same year he started participating in the local street gangs. This started his criminal career; including stealing, trespassing, burglary, and truancy.

In 1989, at fourteen years of age, while still living with his family, Carlos's first girlfriend moved into the home. She lived there until she was five months pregnant, when she left. In 1990 the child Jonathan was born. Carlos found a new girl friend Janet Cruz who had a three-month-old child. She moved into the home. Carlos worked as a roofer to support the family. In 1991 Carlos was expelled from school, at this time he decided to have another child with Janet. Carlos moved into his own home and Carlos Jr. was born in October of 1992.

As his family grew, Carlos's crimes also grew; he was arrested for burglary of a vehicle, unlawful carrying a handgun, and unauthorized use of a motor vehicle. He also moved to injecting cocaine, and smoking crack.

With his 1993 trip to prison, Janet left him. While in prison, Carlos became a member of the Pistolaros, a popular Hispanic prison gang. While he was out of prison on parole, Carlos went out with friends, and now is facing the death penalty.



## EXHIBIT 23

## SWORN AFFIDAVIT OF JOSEPHINE TREVINO

STATE OF TEXAS                   §  
                                         §  
COUNTY OF BASTROP           §

I am Josephine Treviño; I live at XXXX, Elgin, Texas 78621. My date of birth is XXXX, 1957.

I can read and write the English language.

Carlos Treviño is my son; I have known him since he was born on January 24<sup>th</sup>, 1975. I was his parent and guardian until he became of age. I know Carlos was on trial for capital murder. No one has ever come to talk to me about Carlos or his development before. I think there were many things in Carlos's life that affected how he grew up and how able I was to care for him.

I was born in 1957, in San Antonio, Texas. My parents divorced when I was 4 years old. I then went with my brothers and sisters to live with my father's mother. My father Benito Deleon started physically/sexually molesting me when I was 5 years old; and he continued to do so, regularly, until I was 12 years old. I tried to tell my stepmother when I was 7, but she told me it was my fault. I never told anyone else.

My mother died of cancer at 35 years old when I was 10-years old. I went to school until I was in the 7<sup>th</sup> grade, I could read on a 4<sup>th</sup> grade level. I often missed school because of the bruises on my face and body, which I got when my father beat on me. When I was 14 years old my father tried to rape me. Right after that, I ran away, but had to come back home, because I had nowhere else to go.

As I got older, I blamed my self and thought there was something wrong with me that made my father treat me like that. I started drinking a lot. I thought about committing suicide a lot, for a while. Then, I started having sex a great deal with numerous men.

I was 17 years old, when I got pregnant. Carlos has never known or even seen his father. He abandoned Carlos and I, shortly after Carlos was born, and went back to Mexico. I CONTINUED DRINKING HEAVILY THROUGH OUT MY PREGNANCY WITH CARLOS. I would usually drink 18 to 24 cans of Budweiser, every day during my pregnancy with Carlos. He was born on January 24, 1975; he weighted 4 pounds at birth. He had to stay in the hospital for a couple of weeks after he was born, until he weighed 5 pounds. I didn't get to see him while he stayed in the hospital, mostly because it was hard to get a ride back up to the hospital, and I didn't have a car. But, I have to say, too, that I was still drinking everyday, and I really didn't try very hard to go see him.

I had my son Peter a year and a half later. Then, on XXXX/1979 I had my daughter, Elizabeth. But she died on January 4, 1980. The doctors told me she died of 'Sudden Infant Death Syndrome.' I was still drinking heavily, and often fought with my various boyfriends. My romantic relationships were always violent, and my children regularly saw me fight with my boyfriends. I was on Welfare and did not work, and I couldn't afford to rent a place for me and my kids, so we would live with various relatives, and moved from one relative's place to another. In 1982, I had my daughter Jennifer.

I was emotionally unable to care for my children well. But I also realize that I was drinking a lot, too, and that seemed to be more important than taking care of my kids. At the same time, I was not able to provide

for them the way I would have liked to, and I was not able to give them the guidance they needed. I felt so badly about myself and what was so wrong with me to cause my father to treat me the way he did.

I tried to commit suicide several times while Carlos was growing up. I drank everyday. Sometime, during the early 1980's I started taking illegal drugs, too. I often stole for money and food. Sometimes my children and I would sleep under a bridge at the park, on San Pedro Avenue. I would leave them alone in the car or with relatives while I went to the bars to drink. I was always trying to get away from feelings I had about myself.

When Carlos was 6 years old he fell and hit his head on an old piano that was in the place. He started having nosebleeds after that. Then, when he was 9-years old, he was thrown into a light pole, after being hid by a car while he was crossing the street. He was taken to the hospital, but I can't remember the name of the place where he went. Since that car accident, Carlos has had nosebleeds and headaches.

When Carlos got to be 12 or 13, he started stealing and getting in trouble. I was not able to help him do better. He started living the same kind of life I had shown him. He moved away from me when he was 14 years old. Right after that, his girlfriend got pregnant. But she may have been pregnant already, before he left. He started running around with other guys who were in a gang, and he stopped going to school. Carlos worked very hard to provide for his growing family. He had two children by the time he was 17 years old. Even after he moved away, I kept on drinking. I felt guilty because I couldn't help him, like I knew he and his children needed help. But I couldn't do much of anything, and that bothered me a lot.

It has only been recently that I have quit drinking, and have turned myself around. For the first time in my life, I have a good job, and I am taking care of myself. In the last year, I have tried to make my relationship with my daughter be better. We're getting along right now, and have been ever since I quit drinking.

Until Mr. Wolf and Ms. Matthews came to see me at my job in Elgin, Texas, I haven't talked to any lawyer or investigator who was working on Carlos' case. In 1998, I got a letter from a lawyer who said he wanted to talk to me. But when Carlos' trial happened, none of his lawyers ever got in touch with me, and I didn't have an address or a telephone number to contact, so they could talk to me.

After Carlos' trial ended, I heard that there was a new lawyer working on his appeal. But I haven't seen or heard from that person either. No one has ever talked to me about Carlos or his background, until a couple of weeks ago, when Mr. Wolf and Ms. Matthews came to my job at the school in Elgin, Texas, and talked to me.

These statements are true and accurate to the best of my knowledge and research.

Sworn to and subscribed before me the said Ann Matthews on this the 25<sup>th</sup> day of March, 2004.

/s/ Janet Frosch  
Notary Public, State of Texas  
My Commission expires \_\_\_\_\_

[STAMP:

JANET S. FROSCH  
Notary Public  
STATE OF TEXAS  
My Commission Exp. 07/22/2006]

**EXHIBIT 24**

**FASA**

**Forensic Associates of San Antonio**

[letterhead]

**PRIVILEGED AND CONFIDENTIAL  
FORENSIC PSYCHOLOGICAL EVALUATION**

**Petitioner:** Carlos Trevino (#999235)

**Civil No:** SA-O 1-CA-306-FB

**Date of Birth:** XXXX/1975

**Age:** 29

**Dates Evaluated:** 12/12/2003, 02/11/2004

**Date of Report:** 04/16/2004

Carlos Treviño was referred for forensic psychological evaluation by his Federal Habeas attorneys, Mr. F. Alan Futrell and Mr. Warren Alan Wolf. Mr. Treviño is currently incarcerated following a capital murder conviction and death sentence in July of 1997. Three other individuals were convicted of participating in the same underlying offense, but Mr. Treviño was the only defendant against whom the State sought, and obtained, the death penalty.

Based on reviews of his school records, interviews with his mother and family members, and information provided by Mr. Treviño, Mr. Futrell reported that there was evidence suggesting that Mr. Treviño has a history of fetal alcohol syndrome and possible cognitive limitations as a result of prenatal exposure to alcohol. Mr. Wolf interviewed the attorney who was the 'Lead Defense Counsel' at Carlos Treviño's Capital Murder trial—Mr. Mario Treviño (not related), who acknowledged that information regarding Carlos' childhood, including his pre-natal exposure to alcohol, was not ex-



plored or presented as potential mitigating factors in the punishment phase of Carlos' trial. In the affidavit provided by Attorney Mario Treviño to Carlos' habeas attorneys, Mario Treviño, indicated that the defense did not attempt to uncover mitigating evidence about Carlos Treviño's life, as "mitigation experts were not used very much at the time of the trial." It was requested that I evaluate Carlos Treviño regarding the possibility of fetal alcohol syndrome and the effects of prenatal alcohol exposure on his cognitive functioning at the time of the capital offense.

The opinions presented in this report are based on approximately twelve and a half hours of face-to-face contact with Mr. Treviño, all of which occurred at the Polunsky Unit of the Texas Department of Criminal Justice. During this time, I interviewed Mr. Treviño and I administered a comprehensive battery of psychological tests.

Testing consisted of the following:

- Wechsler Adult Intelligence Scale—Third Edition (WAIS-III)
- Wechsler Memory Scale—Third Edition (WMS-III)—Logical Memory Only
- Wisconsin Card Sort Test—64 Card Version (WCST-64)
- California Verbal Learning Test—Second Edition (CVLT-II)—Short Form
- Rey-Osterrieth Complex Figure Drawing Test
- Wide Range Achievement Test—Third Edition (WRAT3)
- Personality Assessment Inventory (PAI)
- Miller—Forensic Assessment of Symptoms Test (M-FAST)



### Rogers Criminal responsibility Assessment Scales (R-CRAS)

In addition to consultation with Mr. Futrell and Mr. Wolf, I conducted interviews with Ann Mathews, Mitigation Specialist, and I conducted a face-to-face interview with Mr. Treviño's mother, Josephine Treviño, at her home in Elgin, Texas, on 03/25/2004. On 02/11/2004, I spoke with the senior warden at the Polunsky unit regarding Mr. Treviño's behavior since his incarceration.

I reviewed copies of the following documents provided to me by Mr. Futrell, Mr. Wolf and Ms. Mathews:

- Psychological evaluation dated 12/09/1998 conducted by Jerome B. Brown, Ph.D.
- Handwritten interview notes taken by Jerome B. Brown, Ph.D., during an interview of Carlos Treviño conducted on 11/20/1998
- 16 Personality Factor (16PF) answer sheet completed by Carlos Treviño on 11/24/1998
- 16PF Test Profile scored and completed by Jerome B. Brown, Ph.D.
- Minnesota Multiphasic Personality Inventory—2 (MMPI-2) answer sheet completed by Carlos Treviño on 11/25/1998
- MMPI-2 Profile Sheets scored and completed by Jerome B. Brown, Ph.D.
- Anger Control Survey completed by Carlos Treviño (undated)
- Michigan Alcoholism Screening Test completed by Carlos Treviño (undated)
- Sworn Statement of Janet Cruz, Carlos Treviño's common law wife
- Sworn Statement of Mario Cantu, close friend of Carlos Treviño

Sworn Statement of Ruben Gonzalez, former paramour of Carlos Treviño's mother

Sworn Affidavit of Mario Treviño, lead trial counsel for Carlos Treviño in his capital murder trial

Sworn Affidavit of Josephine Treviño, Carlos Treviño's mother

Sworn Statement of Juanita Treviño DeLeon, Carlos Treviño's maternal aunt

Sworn Statement of Jennifer Treviño DeLeon, Carlos Treviño's sister

Written correspondence from Carlos Treviño to Mr. Wolf dated 01/26/2003

Eight page handwritten letter from Carlos Treviño to Tom Blimborn, Bill Glass Ministries

Poetry and Internet Postings by Carlos Treviño

Texas Department of Corrections Medical Records

Cumulative School Records from 09/02/1980 (Kindergarten) through 02/15/1991 (Spring Semester of 9<sup>th</sup> Grade)

Bexar County Juvenile Probation Department Records

Bexar County Detention Center Records

Carlos Treviño's Certificate of Birth

***Interviews with Mr. Treviño:***

Prior to beginning this evaluation, I explained to Mr. Treviño that I was appointed by United States District Judge Fred Biery to conduct a comprehensive psychological evaluation to assist his federal habeas counsel in his Federal Habeas Corpus petition. I informed him that this appointment was made at the request of his federal habeas counsel and that my evaluation would include a comprehensive review of his developmental and psychosocial history, as well as the circumstances surrounding his capital offense. I told Mr. Treviño that I would be preparing a written report that would con-

tain my findings and that this document, along with my notes, test protocols, and all documents reviewed would be considered discoverable. Mr. Treviño was able to paraphrase this information back to me in a manner that indicated his understanding of the proceedings, and he agreed to fully participate in the evaluation.

Throughout the evaluation, I found Mr. Treviño to be quite polite, cooperative and motivated. He put forth good effort on all test items and gave no overt or obvious indications of manipulation or malingering. Based on my observations of his behavior, I believe that the following data and opinions accurately reflect Mr. Treviño's personality, emotional and cognitive functioning.

Mr. Treviño reported that he is currently facing the death penalty "because I made the wrong choice to go out with my friends." On the day of his capital offense, he had been "drinking beer since noon," when his cousin convinced him to go to a party with several acquaintances. At the party, he and his friends continued drinking and smoking several joints of marijuana. At some point, Mr. Treviño and four other men, including his cousin, decided to go to a local convenience store to buy more beer. The individual who drove to the store went in to buy the beer, and when he returned to the car he had a 15-year-old girl with him. The driver apparently knew the girl and had offered to give her a ride to a friend's house. Mr. Treviño acknowledged that he was quite intoxicated and "I didn't really know what was going on, but I just went along." They did not return to the party, but went "cruising" and drove to a park on the South Side of San Antonio. One of the men and the girl started kissing and then went into a wooded area. After a time, the others went to investigate and saw the girl and their companion having sex. She appeared to be a willing participant at this time.

Mr. Treviño reported that one of the other's wanted to have sex with her, "but she refused, and then I went back to the car." Although he acknowledges that his memory of that night is somewhat cloudy, he has denied doing anything to the girl himself. He reported that he stayed at the car and eventually the others came back. They did not say anything, but "they were in a hurry, and I didn't ask because I didn't want to know anything." The following day, Mr. Treviño asked one of his companions what happened to the girl and was told that she was stabbed, but the individual he asked stated that he did not know by whom. Shortly thereafter, he found out that the girl was dead and he told his friends "that I didn't want anything to do with them." He was on parole at the time and did not want to be associated with any possible criminal activities. His friends told him that he had had sex with the girl, but he does not really know if this is true and stated that there was no physical evidence that corroborated this information. Mr. Treviño was arrested a few days later.

Mr. Treviño has denied that he raped and killed the girl for whose murder he was convicted. During his capital murder trial, one of the individuals involved testified that he held her down while the other men raped her and that he had at some point alluded to killing the girl. In addition, he reportedly made a statement to the effect that he "learned to break necks in prison," a statement he denies ever making. He refused to testify against his friends and reported that he felt a strong need to protect his young cousin, although he states he was not sure of the extent of his cousin's involvement in the murder. His blood was discovered on an article of the girl's clothing, but he stated he does not see how this could be the case, as he had no cuts or open wounds

on his body at the time of the murder. Mr. Trevino feels that the testimony against him, the DNA evidence linking his blood to the victim's clothing, the fact that he was on parole at the time of the offense, and the fact that he had joined a prison gang during his first incarceration ultimately led to his capital murder conviction and death penalty sentence.

Three other individuals were convicted of participating in the same rape and murder, although Mr. Treviño is the only one who was given the death penalty. Two other participants, Siendo Sam Rey and Santos Cervantes each took a 50 year plea deal and agreed to testify against Mr. Treviño. Brian Apolinar was convicted and sentenced to 25 years after he testified that he watched the offense, but did not participate, try to intervene, or render aid to the girl. Mr. Treviño's cousin, whom he was adamant about protecting, ultimately testified against him, but was not charged with any crime.

Prior to his capital murder trial, Mr. Treviño was presented with a plea offer of life, which he initially accepted, but later turned down when his attorneys presented him with the information in writing and requested that he sign the paperwork. His attorneys reported that he suddenly became very angry and refused to discuss the matter further. When asked why he changed his mind and refused to accept a plea deal, Mr. Treviño reported that his attorneys had told him that the deal was for "40 years." When he looked at the paperwork, he saw that the sentence was "life" and that he was agreeing to testify against the other participants. He stated that at the time, his attorneys had not explained to him that "life" was equivalent to 40 years before he would be eligible for parole. He thought that his deal was for 40 years and when he saw



"life" on the paperwork, he thought that his attorneys were not "being straight with me." In addition, he was angry that he was again being asked to testify, which he continued to refuse to do for fear that he would implicate his cousin in the murder.

Mr. Treviño has been on death row since August of 1997. Review of his behavior records and brief interview with the prison warden indicate that he does not have a history of significant disciplinary actions or history of prison violence. At the time of the present evaluation, he had recently been reprimanded for possessing a postage stamp that he did not purchase in the prison commissary. He denied any current gang involvement.

Mr. Treviño described his childhood and family life as "hard, violent, and chaos" He never knew his biological father. He described his mother as an alcoholic who was sometimes physically abusive toward him and his younger brother. He reported that his mother was always drinking and that there was a great deal of violence between her and the man he referred to as his stepfather (his mother's live-in paramour). He often found himself "scared" and "looking out over my shoulder" as a young child because of the violence. His mother frequently left Carlos and his siblings at home, alone, to go to bars and out with friends to drink. On those occasions, which apparently were not infrequent, when Carlos' stepfather came home, he would become enraged, and take the children with him to look for their mother. He reported that when his mother spotted them looking for her, she would often try to run and his stepfather would race after her with the children in the car. He described these episodes as quite frightening, partly due to the fact that his mother typically "took a beating after she got home." His stepfather did



not hit his mother in front of the children, "it was always behind closed doors, but we could hear the blows and my mother screaming." When she came out of the room she "would be covered with bruises and sometimes blood."

Mr. Treviño denied any history of abuse by his stepfather or any of his mother's boyfriends or other male figures in his life. He did acknowledge that his mother was often abusive toward him and his brother, "she would beat us with her fists and sometime other things." In addition, violence was present in his childhood neighborhood. His mother's cousin was stabbed and killed during a fight when Mr. Treviño was a young child. Although he did not witness this murder "I went and looked at the blood that was in the backseat of the car." A neighbor friend was stabbed and killed in a fight when the children were at home and they witnessed him being carried out of the house.

Mr. Treviño reported that he and his siblings were exposed to drugs at a very young age. "I knew what marijuana and cocaine were by the time I was in first grade." He witnessed the use of drugs by his mother, stepfather and other family members, as well as people in the neighborhood. He started using marijuana, alcohol and cigarettes by age 11. He reported that one of the most difficult things of his childhood was the death of his baby sister when he was almost five years old. He reported that she "just died and they took her away."

Mr. Treviño reported that, when he was ten years old, his mother left and moved away from his stepfather. She took him and his two younger siblings, and moved frequently from one relatives' house to another. When their relatives would no longer care for them, they

lived on the streets. He reported that his mother continued to drink heavily and would often leave him and his brother at home alone, taking his sister with her out to bars to drink.

Mr. Treviño further reported that by the time he was twelve years old, he was "hanging out in the streets." He got involved in some criminal activities, such as stealing and minor violence. He denied any organized gang activity during this time period, although acknowledged that he "hung out with a group of bad kids." He taught himself to drive during a period of time that his mother left the children alone while she went to Mexico. He was sexually active by the age of 12.

Mr. Treviño reported that he dropped out of school during the 9<sup>th</sup> grade after he was expelled for having marijuana in his possession on school property. He stated "I was never good at school anyway, I missed a lot of it." He reported that he repeated several grades and that he often skipped school because "kids made fun of me, my clothes, my shoes and we were always dirty." He had a difficult time with his academic performance, but denied that he was ever placed in a special education program, virtually all of which was corroborated by my review of his school records and my interview with his mother.

Mr. Treviño reported that he started living with his common-law wife, Janet Cruz, at the age of 14. She was 15 at the time they met, and had a four-month-old son. They lived together for a time, but Janet left him at some point due to his increasing alcohol abuse and problems controlling his anger when intoxicated. At the end of 1991, they reunited and "I told her I would straighten up." He did get arrested during this time

for burglary of a building and burglary of a vehicle, but the charges were dropped. Overall, however, he reported that he kept out of trouble and worked to make a home for his wife and child. He acknowledged that he continued to smoke marijuana, but "nothing else."

Mr. Treviño's biological son, Carlos Treviño, Jr., was born in October 1992. Carlos reported that continued to stay out of trouble and says that he was basically happy being at home with his wife and children. He noted that he had always considered his wife's older son to be his own and essentially treated both children the same. In early 1993, "I started hanging with the wrong crowd." He was continuing to use marijuana and started abusing cocaine as well. He and his wife began to argue and he admitted that he was sometimes physically abusive toward her when angry and "when I was drinking." Their relationship continued to deteriorate, even though "I loved her and the kids so much, but I couldn't stop."

In January 1993, Mr. Treviño was arrested for unlawful carrying of a MAC-11 submachine gun at the age of 18. He was released on bond, but did not appear and a warrant was issued for his arrest. For the next eight months, he reported that he continued to use drugs, and his use of cocaine increased. He and his wife continued to have severe problems. She would leave him and he would stop using drugs long enough to get her back, then he would start using again. He later was a driver in convenience store robbery where two of his friends stole beer while he acted as a lookout. He was spotted by a police officer and later arrested for DWI, evading arrest and unauthorized use of a motor vehicle. In late 1993, he was sentenced to six years in prison for the above-noted offenses. While in prison, his wife left him. He acknowledged that he joined the prison gang

known as the "Pistoleros Latinos" during this time in prison, and he has a tattoo acknowledging this affiliation. He reported that when he was in prison "it was just expected" that you join a gang, "so I did."

Mr. Treviño was released on parole in May of 1996. He stated "I vowed to give up drugs and alcohol and change so I could get my family back." He "stayed clean for three weeks" and then started drinking and smoking marijuana, although he continued to avoid cocaine. A short time later, his cousin came to his home and convinced him to attend the party that later led to the capital offense.

*Interview with Mr. Treviño's mother, Josephine Treviño:*

Josephine Treviño was interviewed in her home in Elgin, Texas, on 03/25/2004. Mrs. Treviño is currently working as a janitor in the Elgin School District. She has recently quit drinking and reported that she is "trying to turn my life around." She reported that her son's current federal habeas attorneys were the first people to ever get in contact with her about her son Carlos' Capital Murder trial and conviction, and are the only people who have ever asked her about his developmental, medical and psychosocial history.

Carlos Treviño was born on 01/24/1975. She was 17 at the time of his birth. His biological father was from Mexico and he abandoned them to return to Mexico shortly after Carlos Treviño's birth.

Mrs. Treviño reported that she was born and raised in San Antonio, Texas. Her parents divorced when she was four years old and she and her siblings lived with their father and paternal grandmother. Her father began sexually molesting her at the age of five, and this

abuse continued until she was 12 years old. She made an outcry of this abuse to her stepmother around the age of seven, but her stepmother indicated that it was her fault, so she did not report the abuse to anyone else. Her biological mother died when she was 10 years old.

In addition to the sexual abuse, she reported that she suffered extreme physical abuse at the hands of her father. She often skipped school so that she could hide the bruises caused by this abuse. At the age of 14, her father attempted to rape her, so she ran away from home. She lived on the streets for a time, but her father threatened to harm her further due to the fact that he would lose welfare money and food stamps if she stayed away from the home. She succumbed to his threats and returned home. She noted that she blamed herself for the abuse and later started drinking heavily, had thoughts of suicide, and became sexually promiscuous with multiple men.

Throughout her pregnancy with her son Carlos, she reported that she continued to drink heavily, stating that she consumed approximately 18 to 24 twelve ounce cans of Budweiser beer every day, up to and including the day he was born. In addition, she acknowledged that her father continued to be physically abusive toward her, including kicking her in the stomach, hitting her and throwing her to the floor. When he was born, Carlos Treviño weighed only four pounds and had to remain in the neonatal intensive care unit (NICU) for several weeks until his weight increased to at least five pounds. His mother reported that she left the hospital shortly after his birth and continued to drink. She rarely visited her son while he was in the NICU. She initially stated that she was unable to visit due to difficulty obtaining transportation, but acknowledged that



she continued to drink heavily throughout this time and "I didn't really try very hard."

Mrs. Treviño reported that Carlos Treviño's younger brother was born approximately a year and a half later. Then in September 1979, she had a baby girl named Elizabeth, who died almost four months later of Sudden Infant Death Syndrome. Carlos Treviño was almost five years old at the time of his sister's death. In 1982, his youngest sister, Jennifer, was born.

Mrs. Treviño described herself as emotionally unable to care for herself or her children during their developmental years. Throughout her children's childhood, she continued to drink heavily and was involved in multiple relationships that were often physically violent. She did not work and lived on welfare, which often meant she could not afford adequate food or shelter. She and her children frequently moved from one relative to the other. At times the family was homeless and lived on the streets. She acknowledged that she was often physically abusive to her children. She reported that she could only remember one incidence of physical abuse toward her son Carlos by one of her boyfriends. During this incident, he reportedly tried to defend his mother from being hit by her boyfriend and "he turned on Carlos." Mrs. Treviño reported that she attempted suicide several times while her children were young, and she acknowledged the use of illegal drugs in their presence. In addition, she acknowledged that she frequently left the children alone and unsupervised while she went out drinking. There was no history of involvement from state child protective services, school authorities, or other agencies regarding any history of abuse or neglect, as Mrs. Treviño reported that she would deny offers of help or avoid seeking information or assistance from these agencies.



Although she denied complications during her pregnancy with Carlos Treviño, Mrs. Treviño acknowledged that she did not receive any prenatal care during this time period. As noted earlier, she drank heavily (18 to 24 twelve ounce beers per day) and she admits that she did not attend to nutritional needs. Mrs. Treviño reported that she actually *lost* weight during her pregnancy with her son, Carlos. Carlos Treviño's birth was without complications. Even though she acknowledges drinking right up to the time she went to the hospital, she was never questioned about alcohol use during her pregnancy, even with regard to her son's full term low birth weight. Other than the low birth weight, she denied any history of known early developmental delays. She acknowledged that she did not follow through with regular medical check-ups. She reported that she only took him for one check-up and was told that he was too small for his age.

Mrs. Treviño reported that at the age of two, Carlos fell out of a moving car when the passenger door which he was standing and leaning against, suddenly opened without warning. Although he was visibly bruised, she did not seek medical attention to determine the extent of her son's injuries. A similar accident occurred at the age of four and was witnessed by a police officer. The police officer helped her pick her son up, after he'd fallen out of the window of the car she was driving. She told the officer that she would take him for medical evaluation of possible injuries, but she did not do so. When he was six years old, she reported that Carlos fell and hit his head on a piano. The fall caused him to have a nosebleed and he has experienced recurrent spontaneous nosebleeds since this time. Finally, at the age of nine, Carlos Treviño was hit by a car while crossing the street. The impact caused him to be thrown into a pole

and he was knocked unconscious. He was taken to a local hospital (Mrs. Treviño could not remember the name) where he was treated and released. Mrs. Treviño reported that she did not comply with recommendations for follow-up treatment and evaluation. Mrs. Treviño denied that her son Carlos had any history of psychiatric treatment.

Mrs. Treviño could not identify specific behavioral difficulties when her son was growing up. She was aware that he had behavioral difficulties in school, but described him as generally a good child at home. She reported that he was typically respectful of her and "he treated me well." She noted that he often would "seem like he wasn't listening to me, like he didn't hear me or had trouble understanding the words." His teachers often complained of the same types of behaviors at school, according to Mrs. Treviño. She reported that they spoke both English and Spanish in the home, although she spoke primarily English with her children.

***Summary of Documents Reviewed:***

Review of Mr. Treviño's school records indicated a history of significant academic difficulties. In the 1<sup>st</sup> grade, he obtained C's in Math and Reading, D's in Language and Science, and F's in Spelling and Social Studies. He failed the 2<sup>nd</sup> grade with D's in Reading, Math, Social Studies and Science, a D- in Language, and an F in Spelling. He repeated the 2<sup>nd</sup> grade and obtained D's in Reading, Language, and Spelling, a C- in Math, and I in Social Studies, Science and Conduct. He then failed the 3<sup>rd</sup> grade with F's in every class with the exception of a D- in Social Studies. He repeated the 3<sup>rd</sup> grade and passed with all grades in the 70's. His 4<sup>th</sup> and 5<sup>th</sup> grade records were unavailable, as he reportedly changed schools during this time period. He failed

English and Reading during the 6<sup>th</sup> grade, but was promoted. He failed all classes during the following year, but was promoted to the 8<sup>th</sup> grade at the directive of the school principal. Records indicate that he was absent a total of 51 days during his 8<sup>th</sup> grade year. During the 8<sup>th</sup> grade, he failed all classes with exception of U. S. History (he passed with a 70) and Introduction to Industrial Arts (70). He was absent a total of 43 days. Again, he was promoted to the next grade at the request of the principal. Mr. Treviño did not complete his 9<sup>th</sup> grade year, dropping out of school on 02/15/91 after he was expelled for having Marijuana. His Metropolitan Achievement Test scores indicate predominantly below grade level performance throughout his school history.

Mr. Treviño's probation records dating from August 1988 to August 1992 were reviewed. He was first referred to the probation office by the San Antonio Police Department (SAPD) at the age of 13 for burglary of a building. Mr. Treviño and three acquaintances broke into a barber shop and were caught in the act by the arresting officer. His probation officer met with Mr. Treviño and his mother in September 1988. During this interview, Carlos Treviño told the probation officer that he had not yet enrolled or attended school because he did not have money for clothes or school supplies. His mother told the probation officer that the family did not have money due to the fact that her welfare checks were being held up. Consistent with his school records, the officer further found that Carlos Treviño had experienced multiple school changes and had failed the 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> grades, but was passed to the 7<sup>th</sup> grade due to his age. His mother told the officer that her son had frequent disciplinary problems and she thought her son needed a counselor. The legal case was ultimately

closed due to insufficient evidence and Carlos and his mother were referred to the Youth Services Department for assistance.

A second referral to the probation office was made in May 1989, when Mr. Treviño was still 13 years of age. He was referred by SAPD for a robbery threat. The complainants implicated Carlos Treviño as one of 10 individuals who approached them and robbed them of thirty cents. Mr. Treviño was briefly detained in juvenile detention. He admitted to the probation officer that he was present, but denied his participation in any robbery. His mother refused to attend his detention hearing, and the officer requested an attorney ad litem, due to the fact that Carlos Treviño's mother appeared unconcerned about his welfare. The case was ultimately rejected by the district attorney's office due to lack of evidence. During the same month, Mr. Treviño received a third referral for unauthorized use of a motor vehicle when he was arrested as a passenger in a stolen car. Again, he came to meet with the probation officer alone. This case was also closed due to insufficient evidence.

At the age of 15, Mr. Treviño was referred to the probation office in April of 1990, secondary to a charge of burglary of a vehicle. This case was closed due to insufficient evidence. In November of 1990, he was referred for unlawful carrying of a weapon when he was found to have a 22 caliber handgun with two live rounds of ammunition. Approximately one week later, he was arrested for unauthorized use of a motor vehicle. In January 1991, just after his 16<sup>th</sup> birthday, Carlos Treviño was referred to the probation office after he was arrested for possession of marijuana under two ounces. He was found with approximately 22 marijuana cigarettes on his school campus. In February 1991, his

mother attended his detention hearing and he was ordered detained and subsequently placed on probation. According to probation records, his probation officer noted a week later that Mr. Treviño was working with his stepfather and had dropped out of school (he had been expelled following the marijuana charge). As part of the guidelines of his probation, he was referred for GED classes and substance abuse counseling, and ordered to complete 60 hours of community service. From April through October of 1991, his probation officer noted that he did very well while he was under the structure and supervision of the probation office. He reported to his probation officer as required, completed his community service hours and attended substance abuse counseling. He completed all requirements, with the exception of obtaining his GED, which he attributed to lack of time due to working full time with his stepfather.

In April 1992, Mr. Treviño was again referred to the probation office secondary to burglary of a building and burglary of a vehicle. He was detained and later expressed remorse for his actions. He indicated that he was under the influence of alcohol. He was released under the condition that he continue with substance abuse counseling. He was ultimately given probation in an intensive supervision program. During this time period, he was living with his common law wife, Janet. His probation officer noted that he missed several appointments to report due to his work schedule, but he was compliant with phoning in and was noted to be doing well. He was released from probation on 08/31/1992. Overall, his probation officer noted that Mr. Treviño did very well and kept out of trouble when he was under the structure of his probation requirements.



According to the sworn statement of Janet Cruz, she met Carlos Treviño when she was 15, four months after the birth of her first child, Julio. She lived with Mr. Treviño from 1990 to 1993, when he was sentenced to prison. They were not together as a couple at the time of the capital offense. She described Carlos Treviño as a "caring husband and father." The couple had one biological child, but she reported that he "loved both children and treated Julio like he was his own child." She reported that during the course of their relationship, they lived with both her and her husband's parents, and that Mr. Treviño got along well with both. She described her husband as a hard worker, who worked as a roofer in his stepfather's roofing company. Ms. Cruz felt that their relationship deteriorated as a result of Mr. Treviño's alcohol abuse. She reported "I felt Carlos had another side when he was under the influence of drugs and alcohol." She reported that he was easily influenced by his friends, which she felt was a common factor in his legal troubles. She noted that he could become abusive toward her when intoxicated, but reported that he was always kind and loving toward his children, continuing to the present day to send both children cards on their birthdays and on special occasions.

Juanita Treviño DeLeon is Carlos Treviño's maternal aunt. She is two years older than Mr. Treviño. She reported that she has known Carlos Treviño his entire life and that she often assumed the role of caretaker when his mother would leave him and his brother while she went out drinking. She was able to confirm reports that Carlos Treviño was hit by a car as a child and has suffered chronic spontaneous nosebleeds. She added that Mr. Treviño was very fond of her boyfriend, Mario Cantu. She described Mr. Treviño as someone who was



easily influenced by others and who was frequently left to take the blame for various infractions.

Mario Cantu reported that he has known Carlos Treviño since Carlos was 10 years old. He was five years older than Mr. Treviño, and the boyfriend of Mr. Treviño's maternal aunt, Juanita Treviño. He confirmed that Mr. Treviño and his brother would be left with their aunt for days at a time while their mother left. He reported that Carlos Treviño looked up to him "like a brother." He never knew Mr. Treviño to be violent. He knew that other kids often made fun of Carlos Treviño because he was slow. He described Carlos Treviño as "a follower" who was always the youngest and slowest in the group. He was with Mr. Treviño the first time he was arrested, which occurred because Mr. Cantu and the others reportedly fled the scene and left him to take the blame.

Ruben Gonzales is the owner of Ruben and Son Roofing. He reported that he has known Carlos Treviño since he was 12 years old, when he began living with Mr. Treviño's mother and siblings. He reported that Mr. Treviño began working with him in his roofing company at the age of 12. He initially worked on the weekends and then worked fulltime after he left school. He reported that he was a reliable and hard worker who did not use drugs or alcohol at work. He used the money he earned to take care of his wife and children and frequently gave money to his mother. He never saw Carlos Treviño as a violent person. He confirmed that Mr. Treviño experienced frequent spontaneous nosebleeds.

Jennifer Treviño DeLeon is Carlos Treviño's younger sister. She reported that she is seven years younger than her brother. She described him as very caring and

supportive while they were growing up. She confirmed that her mother was often intoxicated and unable to care for the children. When her mother left the children alone, she reported that her brother would cook and care for her and her other brother, Peter. She knew that her brother was hit by a car as a child and experienced nosebleeds and other problems as a result of this accident.

Carlos Treviño was previously evaluated in December 1998 by Jerome B. Brown, Ph.D. as part of his state habeas corpus petition. The evaluation consisted of an interview and administration of the MMPI-2, 16PF, Anger Control Survey, and Michigan Alcoholism Screening. During this evaluation, Mr. Treviño was noted to be cooperative and the results were judged to be valid. The history documented in Dr. Brown's report is consistent with the details and events currently provided by Mr. Treviño and his mother and information contained in the documents reviewed for this report, with the notable exception of questions regarding mother's prenatal alcohol use. In his report, Dr. Brown indicated that Mr. Treviño was administered the Wechsler Adult Intelligence Scale—Revised (WAIS-R) during his intake and admission to the Texas Department of Corrections. It is unclear if Dr. Brown reviewed the test protocols, as these items were not included in the documents and test data that were provided to me by Dr. Brown. Compounding the issue, records received by my office on Carlos Treviño also did not include any documents or test data regarding such an examination. However, an intake note in Mr. Treviño's TDC medical records indicates that he was administered the "WAIS-R short form." However, my attempts to obtain the test protocol from TDC were unsuccessful. The personality test results were re-

markable for lack of psychopathology and Dr. Brown indicated that these results were atypical for a capital offender. According to Dr. Brown, Carlos' behavior appeared to be more consistent with problems with "immaturity and impulsivity, rather than predatory and aggressive in nature." Carlos' profile was consistent with that of a "problem drinker." Other test results indicated that Mr. Treviño would likely have a "tendency to be easily intimidated by peers who are more sophisticated and more intelligent," he would be able "maintain a clear set of moral right and wrong," "would be subject to group influences and not usually seen as a leader," "does not appear to become aggressive, coercive or threatening when not intoxicated," and the "initiation of violent criminal acts would not be characteristic" of Mr. Treviño, "but he might participate in certain circumstances if he were in an aggressive, violent or criminal group situation."

Mr. Treviño's childhood medical records were unavailable for review. His birth and his evaluation and treatment at the time he was hit by the car occurred at the 'Brady Green Hospital', which is no longer in existence, and from which, apparently, no records have been maintained. Extensive efforts were made to locate these records, but were unsuccessful. According to school records, Mr. Treviño's height at the ages of five, six and eight (age seven was not recorded) was at the 25<sup>th</sup> percentile for boys of Mexican-American ethnicity. His height moved closer to the 50<sup>th</sup> percentile at the ages of 13 and 15 (other ages were not recorded). His weight at all ages recorded was essentially at the 50<sup>th</sup> percentile for boys of his same ethnicity. TDC records indicate that Mr. Treviño's current height is 65 inches, which is slightly below the 25<sup>th</sup> percentile for men of Mexican-American ethnicity.

TDC medical records indicate little history of medical difficulties. He was noted to be administered the WAIS-R short form upon admission to the Polunsky Unit (known as Ellis Unit at the time), but as previously noted, the test protocol was not included in his medical records and attempts to locate this document were unsuccessful. Records indicate that Mr. Treviño drug prescriptions include Metoprolol/Lopressor (for hypertension), Indomethacin (non-steroidal anti-inflammatory drug), and Piroxicam/Feldene (used for pain and swelling).

***Results of Psychological Testing:***

The results of the WAIS-III indicate that Mr. Treviño is functioning within the low-average range of intelligence. He obtained a FSIQ score of 87, which falls at the 19<sup>th</sup> percentile in comparison to age-related peers. His Verbal IQ score of 81 is in the low average range and falls at the 10<sup>th</sup> percentile. His Performance IQ of 97 is in the average range and falls at the 42<sup>nd</sup> percentile. Mr. Treviño's individual WAIS-III subtests scores primarily ranged from low average to average range (Scaled Scores ranged from 4 to 9), with one notable exception. He scored exceptionally high on the Digit Symbol-Coding subtest (Scaled Score = 15). This subtest score was likely influenced by environmental factors associated with his Mr. Treviño's current incarceration. During presentation of this task, Mr. Treviño responded "I'll do really good on this because we write in code all the time here." His score on this test was seven points higher than his WAIS-III mean subtest score of 8 (calculated from all subtest scores), and appears to have been highly influenced by the effects of a unique type of practice effect. If this extreme outlying subtest score were factored out of Mr. Treviño's overall Performance IQ score, his Performance IQ would likely

fall closer to his Verbal IQ score. This finding is consistent with examination of other WAIS-III factor scores. His Verbal Comprehension Index Score (includes Vocabulary, Similarities, and Information) was 86 and his Perceptual Organization Index (includes Picture Completion, Block Design, and Matrix Reasoning) was 88, indicating no significant difference between these factor scores. In comparison, his Working Memory Index (includes Arithmetic, Digit Span, and Letter-Number Sequencing) score of 69 indicates considerable impairment in manipulate and handle numbers in a stepwise, sequential fashion. This index is most directly impacted problems with attention and distractibility. Mr. Treviño's performance on the Processing Speed Index (Digit-Symbol Coding and Symbol Search) was meaningless due to the abnormal variability in subtest scores.

With the exception of the one demonstrated strength on the Digit-Symbol Coding subtest of the WAIS-III, Mr. Treviño demonstrated little other variability in his WAIS-III performance. The only two statistically significant weaknesses were on tests that are highly influenced by attention and concentration (Digit Span and Letter-Number Sequencing). Overall, Mr. Treviño's lower score on the subtests that measure verbal intelligence are reflective of his poor academic history, as these subtests tend to be more highly correlated with schooling. Mr. Treviño's word knowledge, knowledge of common facts, common sense judgment and awareness of social rules and norms falls within the average to just below average range. In general, his WAIS-III profile indicates significant difficulties with tasks that require good attentional capabilities and the ability to learn and retain material without distraction.



| <u>WAIS-III</u>              | <u>Standard<br/>Score</u> | <u>Percentile</u> | <u>Range</u>  |
|------------------------------|---------------------------|-------------------|---------------|
| Verbal IQ                    | 81                        | 10                | Low Average   |
| Performance IQ               | 97                        | 42                | Average       |
| Full Scale IQ                | 87                        | 19                | Low Average   |
| Verbal Comprehension         | 86                        | 18                | Low Average   |
| Perceptual Organiza-<br>tion | 88                        | 21                | Low Average   |
| Working Memory               | 69                        | 2                 | Extremely Low |

WAIS-III Subtest Scaled Scores:

|                    |   |                     |    |
|--------------------|---|---------------------|----|
| Vocabulary         | 8 | Picture Completion  | 7  |
| Similarities       | 6 | Digit-Symbol Coding | 15 |
| Arithmetic         | 6 | Block Design        | 9  |
| Digit Span         | 5 | Matrix Reasoning    | 8  |
| Information        | 8 | Picture Arrangement | 9  |
| Comprehension      | 8 | Symbol Search       | 5  |
| Letter-Number Seq. | 4 | Object Assembly     | 7  |

| <u>WRAT3</u> | <u>Standard<br/>Score</u> | <u>Percentile</u> | <u>Grade<br/>Equivalent</u> | <u>WRAT3/WISC-III<br/>Difference</u> |
|--------------|---------------------------|-------------------|-----------------------------|--------------------------------------|
| Reading      | 77                        | 6                 | 6 <sup>th</sup>             | 77-87 = -10 (nonsig-<br>nificant)    |
| Spelling     | 77                        | 6                 | 5 <sup>th</sup>             | 77-87 = -10 (nonsig-<br>nificant)    |
| Arithmetic   | 60                        | 0.8               | 3 <sup>rd</sup>             | 60-87 = -27 (signifi-<br>cant)       |

The WRAT-3 was administered to obtain a measure of Mr. Treviño's basic academic achievement in the areas of reading, spelling and arithmetic. The reading test measures the ability to recognize and pronounce letters and words out of context. The spelling test requires writing one's name, letters and words to dictation. The arithmetic test requires counting, reading numbers, and solving oral and written math problems. Mr. Treviño's score on the reading test was in the borderline range (Standard Score = 77), or at the 6<sup>th</sup> grade level.



His score on the spelling test was in the borderline range (Standard Score = 77), or at the 5<sup>th</sup> grade level. His score on the arithmetic test was in the deficient range (Standard Score = 60), or at the 3<sup>rd</sup> grade level. Mr. Treviño's performances on the Reading and Spelling subtests of the WRAT3 subtests were consistent with what would be expected given his WAIS-III Full Scale IQ of 87. However, his score on the Arithmetic subtest was significantly lower than expected, indicating a likely learning disorder in this subject area. In general, Mr. Treviño's WRAT3 performance was consistent with his reported and documented academic history.

Mr. Treviño's performance on the CVLT-II indicated low average performance of verbal memory on repeated recall trials of word lists. In general, his performance on this measure was approximately one standard deviation below the mean and indicated variability of attention due to problems with distractibility. His performance on the Logical Memory Task of the WMS-III was in the average range. He was noted to have retained nearly identical information of these items during both the immediate and delayed recall phases. It is noted that the Logical Memory task involves memory of detail presented in a story format, whereas the wordlists on the CVLT-II contain both related and unrelated items presented in a shopping list format, making the later more susceptible to interference from problems with distractibility.

Mr. Treviño's performance on the WCST-64 indicates that his higher executive functioning was within the average range. It took him longer than expected (22 trials) to complete the third category because he tended to perseverate and had difficulty figuring out the correct match principal. Despite these difficulties,

his overall performance was within normal limits for his age group. The Rey-Osterrieth Complex Figure Drawing is designed to measure visual-spatial organizational ability and visual memory. Mr. Treviño's performance on this measure was within normal limits and is consistent with his performance on other measures of non-verbal intelligence and memory.

Mr. Treviño's responses to the PAI resulted in a valid profile. Consistent with his previous psychological evaluation, his profile did not contain evidence of the types of psychopathologies typically associated with the capital offender and death row inmate. He endorsed items that are consistent with the presence of depression, including pessimism, negative expectations, and general feelings of unhappiness and apathy. These findings are not surprising, given his current predicament. In addition, the results are reflective of a comment that he made that "I appreciate what everyone's doing for me, but I don't think anything is going to help." In addition, he scored in the clinical range of a scale measuring an individual's perception of social support. These findings indicate a lack of supportive relationships, a tendency to be highly self-critical, and the perception that others are unsupportive and uncaring. Again, these findings are most likely reflective of his current situation and environment. As with the findings reported in Dr. Brown's evaluation, Mr. Treviño's profile is indicative of a history of drug and alcohol problems.

### ***Summary and Opinion:***

Review of Mr. Treviño's history indicates a number of factors that likely had a negative impact on his cognitive, behavioral and emotional development. Most notable is his heavy prenatal exposure to alcohol. Prenatal

tal exposure to alcohol has been associated in the literature with the development of Fetal Alcohol Syndrome (FAS), a term that was first coined in 1973. Fetal Alcohol Syndrome is diagnosed when there is apparent facial dysmorphology, growth restriction, and central nervous system and neurodevelopmental abnormalities, with or without confirmed prenatal exposure to alcohol. Additionally, extensive research has documented that individuals who were exposed to alcohol prenatally may present with some, but not all of the characteristics of FAS, which is described as being someone with Fetal Alcohol Effects (FAE). This term is frequently used to describe adults who were not identified with FAS as children, as longitudinal studies have found that as individuals age, some of the characteristic signs of FAS become less prominent, particularly the facial dysmorphology and growth restriction characteristics. However, studies have shown that individuals with significant prenatal exposure to alcohol tend to demonstrate varying degrees of cognitive, academic, attentional and behavioral difficulties throughout child and adulthood.

Based on my extensive interviews with Mr. Treviño, the results of a comprehensive battery of psychological tests, my interview with his mother, and my review of the documents associated with his medical, developmental, social and academic history, it is my opinion that Mr. Treviño presents with the characteristics of FAE. Though not clearly conclusive, his facial features include notable distinguishing eye characteristics. His stature is slightly below the norm for his age and ethnic group, although this finding is obviously a less distinguishing feature. His prenatal exposure to alcohol was significant, as was his low birth weight. It is unfortunate that early childhood medical records are unavailable, although Mr. Treviño's mother admits that she

largely neglected to obtain regular medical consultation and check-ups, as well as medical evaluation and treatment in the case of illness or what she determined to be minor, non-life threatening injuries.

The results of the intellectual assessments indicate that Mr. Treviño is functioning within the low average range of intellectual functioning. His verbal, performance and full scale IQ scores are consistent with those found in individuals with FAE. Other characteristics consistent with FAE include a history of employing poor problem-solving strategies, attentional deficits, poor academic functioning, memory difficulties, and history of substance abuse, all characteristics that are present in Mr. Treviño's history and test results. Although many of these characteristics are also consistent with a history of physical abuse, neglect, and other clinical and behavioral disorders, it is important to note that research has indicated that only individuals with FAS/FAE tend to present with long term problems with adaptive functioning, regardless of home background, history of childhood abuse or trauma, social background, or history of clinical and/or behavioral problems. In essence, individuals with histories of significant prenatal exposure to alcohol have been shown to present with deficits in adaptive behavior, poor judgment, attentional deficits, and other cognitive deficits throughout childhood, adolescence and into adulthood, which is not the finding in individuals with other childhood difficulties. In addition, the deficits found in FAS/FAE children tend to become more debilitating as these individuals get older.

It is important to note that Mr. Treviño's overall test scores of intellectual functioning reflect some variability in his cognitive abilities, including one significantly high test score (Digit Symbol/Coding) on a task meas-

uring flexibility in learning situations, visual-motor skills, and the ability to absorb new material in an associative context. This high score seems in conflict with the typical FAS/FAE picture of characteristic deficits. However, it is likely that this observed strength is a reflection of Mr. Treviño's adaptation to his current environment. The death row environment can essentially be seen as conducive to learning, particularly with individuals who have histories of attentional deficits, problems with distractibility, and other cognitive/intellectual difficulties. Inmates in this environment spend long hours in their cells, with restricted contact with other inmates, guards and other personnel, thereby restricting the amount of distractions that would otherwise interfere with learning. Their exposure to other common environmental stimuli is restricted, lessening distractions and improving learning conditions. These observations are consistent with Mr. Trevino's statement that the Coding task on the WAIS-III would be easy for him because the inmates had learned to communicate in code. In addition, he reported that he had gained an appreciation for reading due to his long hours of isolation, as well as having worked on improving his writing skills in order to communicate with pen pals and family members. These experiences may have resulted in better scores on the current measures of cognitive and academic functioning, compared to what the results might have been had the issue of FAS/FAE been investigated, developed and presented, during the punishment phase of Mr. Treviño's capital murder trial.

Based upon the current forensic psychological assessment, it is my opinion that Mr. Treviño's history, his clinical presentation and the psychological test results are consistent with the characteristics of FAE. This



finding does not indicate the presence of mental retardation. Based on my evaluation, Mr. Treviño's history of FAS would not have significantly interfered with his ability to know right from wrong, or to appreciate the nature and quality of his actions at the time of the capital offense. However, his history of FAE clearly had an impact on his cognitive development, academic performance, social functioning, and overall adaptive functioning. These factors, along with his significant history of physical and emotional abuse, physical and emotional neglect, and social deprivation clearly contributed to Mr. Treviño's ability to make appropriate decisions and choices about his lifestyle, behaviors and actions, his ability to withstand and ignore group influences, and his ability to work through and adapt to frustration and anger. These deficits would not only have impacted any of Mr. Treviño's decisions to participate in or refrain from any activities that resulted in his capital murder charges, but also likely impacted his ability to understand and make appropriate decisions about the plea offer presented by his counsel. These findings are consistent with his description of his inability fully comprehend his attorney's explanation of the original plea offer of a life sentence ("forty-years"), his social awareness with regard to his assumption of loyalty toward his friends and family members, and his ability to confide in his attorneys with regard to his apprehensions and perceived sense of mistrust. Likewise, as his original defense attorneys apparently did not explore, develop or present any mitigating evidence regarding Mr. Treviño's prenatal, developmental, social and academic background at the time of his trial, they were unlikely aware of his deficits.

Further, according to my review of visitation records from the Bexar County Detention Center, Mr. Treviño



was held, pending his capital murder trial, his original attorneys visited and conferred with him on very few occasions, for short periods of time. Such minimal contact, coupled with the failure to explore and develop mitigating evidence regarding Mr. Treviño history of FAE would have made it difficult for his original defense attorneys to effectively assist him in making appropriate decisions with regard to his defense.

/s/ Rebecca A. Dyer, Ph.D.  
Rebecca A. Dyer, Ph.D.  
Clinical and Forensic Psychology  
Forensic Associates of San Antonio, P.A.

Pursuant to 28 U.S.C. §1746, I certify under penalty of perjury that the foregoing is true and correct.

Executed on this the 6<sup>th</sup> day of May, 2004.

/s/ Rebecca A. Dyer, Ph.D.  
Rebecca A. Dyer, Ph.D.

**EXHIBIT 25****SWORN STATEMENT OF JANET CRUZ****STATE OF TEXAS §****COUNTY OF BEXAR §**

My name is JANET CRUZ. I live at XXXX, McDade, Texas 78650. My telephone number is XXXX. My date of birth is XXXX/74.

I can read and write the English language.

Carlos Trevino is the father of my child, Carlos Trevino Jr. who was born on XXXX/92. I have known Carlos since I was 15 years old. I met him in April 1990. I had just given birth to my first child Julio on XXXX/90.

I lived him with as his common law wife for approximately three years from 1990 to 1993. In 1993 he went to prison. In 1996 I was no longer going with him.

He has always been a caring husband and a caring father.

Although our relationship deteriorated because of the way he treated me when he was under the influence of alcohol he never was anything but a loving, caring father to both of my children. Carlos knew that Julio, my first child was not his child but Carlos treated Julio as if he was his own.

When we first got together we lived his mother Josephine Trevino. I stayed with them on and off. Ruben Gonzales, her boyfriend, also lived there. Ruben was a roofer and gave Carlos a doing roofing work.

When I was not staying with Carlos' mother I would stay with my sister Nicole Cruz. Carlos got

along well with my father who is now dead and my mother.

When we were together Carlos would take the family places like Medina Park and Medina Lake. We would have cookouts. Carlos was a good swimmer and would like to take Julio swimming. We would also go the the drive in movies.

Then there was the other side of Carlos. Carlos had tattoos when I met him. I am not sure if he had any on his chest. I am not sure and I don't remember.

When I heard that he was arrested for capital murder I couldn't believe it. I was angry. I was confused. Some part of me does not believe he was part of this. It was like there was two parts to him. But that was not the real person that I knew who Carlos truly was.

After he was arrested I visited him in the Bexar County Jail. After he was convicted I went to see him in Huntsville and Livingston. After all the time he has spent in prison he has never forgotten either of my two sons for which I am thankful. Carlos always sends Julio and Carlos Jr. cards for Christmas and their birthdays. Carlos has told me that in his eyes he will always be Julio's father.

I was never asked by his attorneys to testify at his trial.

STATE OF TEXAS

§

COUNTY OF BEXAR [handwritten correction: Bastrop]

§

BEFORE ME, the undersigned authority, on this day personally appeared JANET CRUZ, known to me to be the person whose name is subscribed to the fore-

going instrument and, being by me first duly sworn, upon oath declared that the statements contained therein are true and correct.

/s/ Janet Cruz  
JANET CRUZ

Subscribed and sworn to before me this 21 day of July, 2003 A.D. to certify which witness my hand and seal of office:

/s/ T.M. Turner  
Notary Public

[STAMP:

T.M. TURNER  
Notary Public, State of Texas  
My Commission Expires  
AUGUST 30, 2006]

**EXHIBIT 26****SWORN STATEMENT OF MARIO CANTU****STATE OF TEXAS §****COUNTY OF BEXAR §**

My name is MARIO CANTU. I live at XXXX, San Antonio, Texas 78210. My telephone number is XXXX. My date of birth is XXXX/70. I attended Lanier High School until the 10th grade. I can read and write the English language.

I have known Carlos Trevino since he was 10 years old. His parents would leave him with my sister. His mother would take off for days and come to take him back when she was ready, I was like an older brother to him.

He was always following me around. We would go to the gym and play basketball. We would go to the parks and play. We would have bar-b-ques.

Carlos was not a violent person. He was easy to get along with. Sometime my friends, who were older than Carlos, would make fun of him just for the fun of it.

Carlos was artistic. He liked to draw pictures of people.

He also liked music. In fact he wrote a song to my sister Janie De Leon.

Carlos was a follower as I am 5 years older. The first time he ever got in trouble was when we all got on the roof at Lowell Middle School. We were just goofing off. Carlos was the youngest and the slowest and he

was the only one that got caught. That was the first time that Carlos was ever arrested.

I am aware of the charges against Carlos and that he was convicted for the offense of Capital Murder. Carlos was a peaceful person and he was not violent.

STATE OF TEXAS §

COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, on this day personally appeared MARIO CANTU, known to me to be the person whose name is subscribed to the foregoing instrument and, being by me first duly sworn, upon oath declared that the statements contained therein are true and correct.

/s/ Mario Cantu  
MARIO CANTU

Subscribed and sworn to before me this 30 day of JUNE, 2003 A.D. to certify which witness my hand and seal of office.

/s/ Melissa Gomez  
Notary Public

[STAMP:

MELISSA GOMEZ  
Notary Public, State of Texas  
My Commission Expires  
March 11, 2007]



**EXHIBIT 27****SWORN STATEMENT OF RUBEN GONZALEZ****STATE OF TEXAS §****COUNTY OF BEXAR §**

My name is Ruben Gonzalez. I live at XXXX, San Antonio, Texas 78207. I am 39 years old, born on XXXX,1963.

I can read English a little and understand English a little. I understand Spanish better. My friend Jesse Pena, age 41, XXXX, San Antonio, Texas 78207, helped me read this statement and translated for me.

I am the owner of Ruben and Son roofing. I have known Carlos Trevino since he was 12 years old. I was living with his mother. Josie De Leon Trevino and his brother and sister.

We lived together on Iowa and Hackberry and Hackberry and Houston street. We moved to the Sutton Homes on Lena Home and later to a house on Faye Street.

Since Carlos was about 12 years old he started working with me as a roofer. At first on weekends only. He would get paid \$60.00 a day.

After he left school, starting in the summers he would work full time making \$240.00-\$260.00 per week.

He was a hard worker. He would work a full day, from sun up to sun down. No drinking alcohol or smoking marijuana was allowed on the jobs.

As soon as Carlos would get paid he would use his money to buy things for his children, such as clothes and food.

He talked about them all the time. He loved his children.

He would also buy things for his mother such as flowers and would take her out to dinner.

Carlos was not a violent person. He would not get into any fights. I never saw him use a gun or knife.

I would see him get nose bleeds. I found out from his grandfather, Benito De Leon, that Carlos was hit by a car when he was a young boy and he hit his head. Carlos would bleed a lot from his nose, sometimes everyday.

When Carlos was on parole I would help him by taking him to report to his parole officer.

Carlos is not a violent person. I know he has done some bad things such as burglarizing cars but he has never been involved in violence.

No lawyer or investigator other than Warren Wolf has ever called me and visited with me about what I know about Carlos Trevino.

I have had the foregoing read to me and it is true and correct.

**STATE OF TEXAS** §

**COUNTY OF BEXAR** §

**BEFORE ME**, the undersigned authority, on this day personally appeared **RUBEN GONZALEZ**, known to me to be the person whose name is subscribed to the foregoing statement and, being by me first duly sworn, upon oath declared that the statements contained therein are true and correct.

/s/ Ruben Gonzalez  
RUBEN GONZALEZ

Subscribed and sworn to before me this 10th day of  
October, 2003 A.D. to certify which witness my hand  
and seal of office.

/s/ Melissa Gomez  
Notary Public

[STAMP:

MELISSA GOMEZ  
Notary Public, State of Texas  
My Commission Expires  
March 11, 2007]

**EXHIBIT 28**  
**SWORN STATEMENT**

**STATE OF TEXAS** §  
**COUNTY OF BEXAR** §-

My name is Jennifer De Leon. I live at XXXX, Elgin, Texas 78621. I wish to add to my previous statement.

Carlos Trevino is my older brother.

Carlos was very artistic, even when he was young. I remember him drawing "Mickey Mouse".

Peter Sanchez is my father. He is also my brother Peter's father. We call my brother "Junior". Mr. Sanchez is Carlos' stepfather.

My father did not consider Carlos his son. He treated him differently from Peter and I. He would always pinch Carlos very hard when he was 5 and 6 years old. Mr. Sanchez was also very abusive to my and Carlos' mother Josie De Leon. Carlos would stick up for my mom and Mr. Sanchez did not like that.

One time, Mr. Sanchez threatened to throw Carlos off the balcony from our 2<sup>nd</sup> story apartment. In 1998, Mr. Sanchez threw Carlos out of the house.

Carlos always felt left out. When Mr. Sanchez pinched Carlos it was so hard that it would leave a mark.

I dropped out of school in the 7<sup>th</sup> grade.

My mother finally had enough and moved away from Mr. Sanchez. She took me and my brothers to stay with her sister Virginia De Leon in Elgin, Texas. My cousin Veronica lived with us too.

My grandfather Benito was also there. He would beat Peter (Junior) and Carlos with a belt. He would give me a lot pills (medicine) and tell me it was candy.

STATE OF TEXAS §

COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, on this day personally appeared JENNIFER DE LEON, known to me to be the person whose name is subscribed to the foregoing instrument and, being by me first duly sworn, upon oath declared that the statements contained therein are true and correct.

/s/ Jennifer De Leon  
Jennifer De Leon

Subscribed and sworn to before me this Feb day of 18, 2004 A.D. to certify which witness my hand and seal of office:

/s/ [illegible]  
Notary Public

**EXHIBIT 30****SWORN STATEMENT OF LORRAINE REAGAN**  
**[letterhead omitted]****STATE OF TEXAS §****COUNTY OF BEXAR §**

My name is Lorraine Reagan. I used to be Carlos Trevino's Juvenile Probation Officer. Carlos Trevino on April 19, 1991 appeared before the Court on a Motion Modify Disposition and placed on Probation for several misdemeanor offenses. During this timeframe, Carlos was living with this mother, Ms. Josephine Trevino and his girlfriend. Carlos had dropped out of school in 1991 and working with this step-father doing construction work. Carlos completed 60 hours of Community Service Restitution. Carlos had been very cooperative with this officer. Carlos admitted to participating in the alleged offense and appeared remorseful for his action. Carlos admitted to being under the influence of alcohol at the time of the alleged offense. Carlos was placed on Probation in the custody of his mother and was referred to the Intensive Supervision Program.

**STATE OF TEXAS §****COUNTY OF BEXAR §**

BEFORE ME, the undersigned authority, on this day personally appeared LORRAINE REAGAN, known to me to be the person whose name is subscribed to the foregoing instrument and, being by me first duly sworn, upon oath declared that the statements contained therein are true and correct.



/s/ Lorraine Reagan

Lorraine Reagan

Subscribed and sworn to before me this 5 day of Augut, 2003 A.D. to certify which witness my hand and seal of office.

/s/ Terri Ann Cordova

Notary Public

[STAMP:

TERRI ANN CORDOVA

NOTARY PUBLIC

STATE OF TEXAS

My Comm. Expires 03-10-2008]

**EXHIBIT 33**

STATE OF TEXAS §

COUNTY OF BEXAR 5

**AFFIDAVIT**

On this day appeared before me, the undersigned authority, Warren A. Wolf, who after first being sworn by me, upon his oath deposed as follows:

"My name is Warren A. Wolf, I am competent to make this affidavit, and have personal knowledge of the assertions herein contained.

"In connection with the Federal Habeas Corpus Petition of Carlos Treviño, I contacted Mr. Ed Villanueva, inquiring about information regarding his work and work product as the pre-trial and post-trial investigator for trial attorney Mario Treviño. Specifically, I asked Mr. Villanueva about his contacts with Carlos Treviño's family.

"Shortly after that contact, I received in my office, the e-mail note to which this affidavit is attached. From the heading, content, and sign-off in that note, and the context in which it was sent, I believe it to have been sent to me by Mr. Villanueva.

"I have not altered or otherwise changed or amended that e-mail, and it is presented as an exhibit to the Successor Habeas Corpus Petition exactly the same as I received it."

Warren A. Wolf  
Warren A. Wolf, affiant

Further affiant sayeth not.

Sworn to and subscribed before me, on this the 16<sup>th</sup>  
day of August, 2004.

Cheri A. Boucher  
Notary Public, State of Texas

[STAMP:

CHERI A BOUCHER  
NOTARY PUBLIC  
State of Texas  
Comm. Expires 03-15-2008]

|       |                                             |
|-------|---------------------------------------------|
| Subj: | Re: ReMerry Christmas                       |
| Date: | 12/17/2003 6:11:42 PM Eastern Standard Time |
| From: | DETECTINV                                   |
| To:   | WWolf711                                    |

Warren: And a very Merry Christmas to you and your family, and may all the Holiday Season be Merry and Bright. I don't recall looking for any of his relatives, I believe I was told not to look for them because they did not want to get involved; and then again it's hard to recollect exactly. I did visit him in jail several times, both alone and with his Attorney. And he never did furnish us with any leads, other than the cousin that testified against him. I will be glad to serve any and all subpoenas you need to get served, just give me a phone call at XXXX....Ed

# **PETITIONER'S BRIEF**

RECORD  
AND  
BRIEFS

No. 11-10189

Supreme Court, U.S.  
FILED

DEC 13 2012

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

CARLOS TREVINO,

*Petitioner,*

*v.*

RICK THALER, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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## QUESTION PRESENTED

In *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012), this Court held that ineffective assistance of counsel in an “initial-review collateral proceeding”—that is, a collateral proceeding that “provide[s] the first occasion to raise a claim of ineffective assistance at trial”—may provide cause to excuse a procedural default when a claim of ineffective assistance of trial counsel is raised in a federal habeas proceeding. Petitioner Carlos Trevino, a condemned Texas prisoner seeking to excuse the procedural default of a claim of ineffective assistance of trial counsel, filed a petition for a writ of certiorari presenting the following question:

Whether the Court should grant certiorari, vacate the Court of Appeals’ opinion, and remand to the Court of Appeals for consideration of Mr. Trevino’s argument under *Martinez v. Ryan*.

After Trevino filed his petition in this Court, but before the Court acted on that petition, the United States Court of Appeals for the Fifth Circuit held in *Ibarra v. Thaler*, 687 F.3d 222 (2012), that *Martinez* does not apply in habeas cases arising from Texas courts. This Court subsequently granted Trevino’s petition for a writ of certiorari. Given this posture, the Question Presented is reformulated as follows (*see* S. Ct. R. 24.1(a)):

Whether, under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), a death-sentenced prisoner confined pursuant to a Texas judgment may assert ineffective assistance of state habeas counsel as cause to excuse the procedural default of a claim of ineffective assistance of trial counsel.



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IN THE  
**Supreme Court of the United States**

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No. 11-10189

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CARLOS TREVINO,

*Petitioner,*

*v.*

RICK THALER, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

**INTRODUCTION**

When petitioner Carlos Trevino was on trial for his life, his counsel owed him a duty to investigate his background and to develop and present to the jury any mitigating evidence that might have affected the jury's assessment of Trevino's moral culpability. Had trial counsel done so, he would have discovered substantial evidence that Trevino was subjected to severe abuse and neglect as a child, suffered from the effects of fetal alcohol syndrome, and endured lasting psychological burdens from his harsh upbringing. Instead, Trevino's counsel conducted no reasonable mitigation investigation whatsoever, and the jury imposed a death sentence without hearing any of that evidence.

Texas's statutes, rules, and practices for death-penalty cases ascribe different functions to direct appeals and postconviction proceedings. Under those procedures, the proper time and place for Trevino to challenge his sentence on the ground of trial counsel's ineffectiveness was in a state habeas corpus application. Texas's highest criminal court has repeatedly directed inmates to raise ineffective-assistance claims in that forum, not on direct appeal. Trevino's state habeas counsel had a statutory and professional duty to investigate trial counsel's performance, to determine whether any mitigation evidence could have been developed and presented, and to raise any colorable ineffective-assistance issues. Appellate counsel had no such responsibilities. And Texas law expressly made special funding available for the necessary fact development to Trevino's state habeas counsel, not to his appellate counsel. Yet Trevino's state habeas counsel failed to investigate or assert Trevino's substantial ineffective-assistance claim. Only when new counsel was appointed by a federal habeas court did any lawyer finally look into Trevino's background and discover trial counsel's plainly deficient performance. By that time, the claim had been procedurally defaulted.

These are precisely the circumstances that led this Court in *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012), to recognize a narrow exception to the procedural-default doctrine under which the ineffectiveness of counsel in an "initial-review collateral proceeding" may provide cause to excuse the default of a claim of ineffective assistance at trial. Like Arizona, Texas systematically channels ineffective-assistance claims into initial-review collateral proceedings. This Court's procedural-default rules should reflect and reinforce that choice. As in *Martinez*, the Texas system makes the state ha-

beas proceeding the first occasion for a death-sentenced prisoner to develop the record necessary to establish ineffective assistance of trial counsel. It was only the ineffectiveness of Trevino's state habeas counsel that prevented him from complying with those procedures. The equitable rationales underlying *Martinez* accordingly apply equally in Texas cases. This Court should reverse the judgment below and remand the case to permit Trevino to pursue his ineffective-assistance claim under the standards set forth in *Martinez*.

### **OPINIONS BELOW**

The opinion of the court of appeals (JA134-191) is unpublished but is available at 449 F. App'x 415. The order denying rehearing and rehearing en banc (JA192-193) is unreported. The opinion of the district court (JA29-133) is reported at 678 F. Supp. 2d 445.

### **JURISDICTION**

The court of appeals entered judgment on November 14, 2011, and denied a timely petition for rehearing or rehearing en banc on January 31, 2012. The petition for a writ of certiorari was filed on April 30, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **STATUTORY PROVISIONS INVOLVED**

Pertinent provisions of the Texas Code of Criminal Procedure are reproduced in the Appendix to this brief. App. 1a-9a.

### **STATEMENT**

#### **A. Trevino's Trial And Sentencing**

On June 9, 1996, fifteen-year-old Linda Salinas was brutally raped and murdered in a park in San Antonio,

Texas. Petitioner Carlos Trevino and three acquaintances were arrested and charged for their alleged roles in Salinas's death.

Trevino was tried by a jury for capital murder. The evidence revealed that, on the night of June 9, 1996, Trevino and three other men—Santos Cervantes, Seanido Rey, and Trevino's cousin Juan Gonzales—were passengers in a car driven by Brian Apolinar. JA30-31. The five men had been at a party and had left together to buy food and beer at a local convenience store. Salinas was at the store when the men arrived. Cervantes approached her and persuaded her to get into the car, promising to give her a ride to a nearby restaurant. JA30. Instead of driving her to the restaurant, however, Apolinar drove to a park, where Cervantes, Apolinar, and Rey sexually assaulted Salinas repeatedly while she struggled unsuccessfully to escape. JA32.

Gonzales was the prosecution's main witness and the only alleged eyewitness to testify at trial.<sup>1</sup> He testified that he overheard Apolinar, Cervantes, and Trevino discuss their desire not to leave any witnesses behind. JA32. He further testified that Cervantes and Trevino had blood on their clothes when they returned to the car. *Id.* According to Gonzales, Trevino also commented during the drive away from the park that he had "learned how to kill in prison" and "learned how to use a knife in prison." *Id.* Gonzales said he never saw Trevino with a knife at the scene of the murder. He also testified, however, that he had seen Cervantes with a knife a few days before the murder, and that

---

<sup>1</sup> Gonzales, a juvenile at the time of the crime, was not charged in connection with the murder.



Cervantes told him two days after the murder that he had broken the knife and thrown it into a river. JA33.

Salinas's body was found in the park the day after the murder. JA33. An autopsy revealed that she died as the result of stab wounds to her neck. *Id.* Trevino was indicted on a charge of capital murder for "intentionally and knowingly causing the death of Linda Salinas by cutting and stabbing her with a deadly weapon while in the course of committing and attempting to commit the aggravated sexual assault of Salinas." JA34.

Trial commenced on June 19, 1997. JA1. Trevino was represented by appointed counsel. The prosecution presented testimony from Gonzales and others concerning the events of June 6, 1996, as well as evidence collected from the crime scene. JA30-34 & n.2, JA35-36. The defense put on no witnesses.<sup>2</sup> On July 1, 1997, the jury returned a guilty verdict. JA36.

The penalty phase began the next day. The prosecution called ten witnesses. It produced evidence that Trevino had several juvenile adjudications on his record; that, as an adult, Trevino had been convicted of driving while intoxicated, burglary of a vehicle, and burglary of a building; and that Trevino had been a

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<sup>2</sup> Several years later, federal habeas counsel learned that one of the other men, Seanido Rey, had given a "detailed, sworn, written statement to police on June 12, 1996, which completely exculpated Carlos Trevino." JA165 (Dennis, J., dissenting). That statement was never produced to defense counsel. In his federal habeas petition, Trevino sought relief on the basis of Rey's statement under *Brady v. Maryland*, 373 U.S. 83 (1963). The lower courts rejected that claim on the ground that the suppressed statement was not material. See JA140-147 & n.3, JA149-153, JA158. This Court denied Trevino's petition for a writ of certiorari as to that issue.



member of a prison gang. JA36-37. The defense presented only one witness, Trevino's aunt, who testified in general terms that Trevino had experienced a difficult upbringing and dropped out of school. She testified that Trevino was good with children (including his own child) and that, having known Trevino his whole life, she believed he was not capable of murder. JA37, JA285-291. Defense counsel conducted no mitigation investigation and presented no other evidence that would have been relevant to the jury's consideration of Trevino's moral culpability.

On July 3, 1997, after deliberating approximately seven hours, the jury returned its verdict. JA1. The jury found that Trevino posed a future danger to society; that he actually caused the death of Salinas or intended to kill her or anticipated that a human life would be taken; and that, considering all of the evidence, there were not sufficient mitigating circumstances to warrant a sentence other than death. JA138.<sup>3</sup> Consis-

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<sup>3</sup> At the time of Trevino's trial, Texas law required a jury at the penalty phase of a capital-murder trial involving more than one alleged party to the crime to answer two special issue questions: (1) whether the defendant poses a future danger to society; and (2) "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." Tex. Code Crim. Proc. art. 37.071(2)(b) (1996). If the jury answered both questions in the affirmative, it was then required to determine:

[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

*Id.* art. 37.071(2)(e) (1996).

tent with the jury's verdict, the trial court imposed a sentence of death. *Id.*

## **B. Trevino's Direct Appeal And First State Habeas Proceeding**

1. In 1995, Texas enacted a dual-track review procedure for cases in which a defendant is sentenced to death. *See* Habeas Corpus Reform Act, 1995 Tex. Sess. Law Serv. ch. 319, § 1; *see also* 43B Dix & Schmoleskey, *Texas Practice: Criminal Practice and Procedure* § 58:64 (3d ed. 2011) ("*Texas Practice*") (describing dual-track procedure). "[E]nacted to implement more efficiently the Texas Constitutional mandate that '[t]he Legislature shall enact laws to render the remedy [of habeas corpus] speedy and effectual'" in death-penalty cases, the legislation "made three major changes to Texas law":

1) it adopt[ed] a unitary system for death penalty habeas review in which direct appeals and habeas review proceed[] along parallel paths at roughly the same time; 2) it adopt[ed] the abuse of the writ doctrine ... ; and 3) it provide[d] for the appointment and payment of counsel to represent all those convicted of capital murder and sentenced to death in their habeas petitions.

*Ex parte Kerr*, 64 S.W.3d 414, 418 (Tex. Crim. App. 2002) (quoting Tex. Const. art. 1, § 12; other citations and internal quotation marks omitted).

Under this dual-track system, after a court imposes a death sentence, the direct appeal to the Court of Criminal Appeals and any application to the trial court for a writ of habeas corpus occur simultaneously, with separate counsel for each proceeding. Direct review in

the Court of Criminal Appeals is automatic in death-penalty cases. Tex. Code Crim. Proc. art. 37.071(2)(h). The court must appoint appellate counsel “[a]s soon as practicable after [the] death sentence is imposed.” *Id.* art. 26.052(j) (App. 8a). For the parallel habeas proceeding, the court must appoint separate counsel “[a]t the earliest practical time, but in no event later than 30 days[] after” the court makes required findings that the defendant is indigent and desires counsel for the purpose of a writ of habeas corpus. *Id.* art. 11.071 § 2(c) (App. 1a-2a).<sup>4</sup> Any habeas application must be filed within 180 days after counsel’s appointment or 45 days after the State files its brief on direct appeal, whichever is later. *Id.* art. 11.071 § 4(a) (App. 4a-5a).

2. Consistent with that dual-track system, Trevino pursued his direct appeal and state postconviction relief at the same time and with separate counsel. On July 11, 1997, eight days after sentencing, the trial court appointed new counsel to handle Trevino’s direct appeal. JA3. Trevino raised nineteen claims of error. All of those claims were based on the trial record. For example, Trevino challenged the trial court’s denial of his motion for a mistrial concerning deficiencies in voir dire, various evidentiary rulings and jury instructions, and the sufficiency of evidence as to his future dangerousness. JA12-21. Trevino also raised several challenges to the constitutionality of Texas’s capital-sentencing scheme. JA22. Trevino did not argue that he had received ineffective assistance of counsel at

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<sup>4</sup> At the time of Trevino’s trial, the statute required the convicting court to make that determination “immediately after judgment is entered,” and the Court of Criminal Appeals was to make the appointment “at the earliest practical time after receipt” of the necessary documents from the convicting court. Tex. Code Crim. Proc. art. 11.071 § 2(b), (d) (1996).

trial.<sup>5</sup> On May 12, 1999, the Court of Criminal Appeals affirmed Trevino's conviction and sentence. JA12-22.

Meanwhile, on January 19, 1998, separate counsel was appointed to pursue state habeas relief on Trevino's behalf. JA2. Unlike appellate counsel, habeas counsel bore a responsibility under Article 11.071 of the Texas Code of Criminal Procedure to conduct an independent investigation of any potential collateral claims "expeditiously, before and after the appellate record [was] filed in the court of criminal appeals." Tex. Code Crim. Proc. art. 11.071 § 3(a) (App. 3a). Nevertheless, Trevino's state habeas counsel never investigated Trevino's life history or other potentially mitigating factors that would have been relevant to the jury's deliberations at the penalty phase of Trevino's trial. See JA525.

On April 19, 1999, Trevino's habeas counsel filed an initial application for a writ of habeas corpus in the state trial court. JA3. The application repeated the same record-based arguments Trevino had raised on direct appeal. *Compare* First State Habeas Appl. (Tex. Crim. App. Apr. 19, 1999), *with* Appellant's Br. (Tex. Crim. App. Sept. 4, 1998). It also argued that trial counsel had rendered ineffective assistance at the guilt and sentencing phases of Trevino's trial. JA321-349.

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<sup>5</sup> Trevino's trial counsel moved for a new trial shortly after sentencing, challenging the trial court's denial of Trevino's motion for a continuance to allow counsel to voir dire the jurors on their opinions regarding DNA evidence. Although this motion was styled as an "ineffective assistance of counsel" claim on the theory that the court's denial of a continuance prevented trial counsel from preparing fully, it was in substance a routine challenge to an alleged record-based trial error. See JA309-310. The motion was denied by operation of law when the trial court failed to rule within 75 days after sentencing. JA95; see Tex. R. App. P. 21.8.



But those claims—which simply challenged trial counsel’s failure to preserve the various errors Trevino had raised in his direct appeal—were similarly based only on the trial record. *Id.* They did not address trial counsel’s failure to conduct any mitigation investigation.

On July 10, 2000, the trial court held an evidentiary hearing on Trevino’s application, in which Trevino presented the testimony of trial counsel and no other witnesses. JA39-40.<sup>6</sup> On December 6, 2000, the court issued findings of fact and conclusions of law recommending that Trevino’s state habeas application be denied. JA40. On April 4, 2001, the Court of Criminal Appeals adopted those findings of fact and conclusions of law and denied the application. JA25-26.

### C. Federal Habeas Corpus Proceedings

On March 14, 2002, represented by the same attorney who had handled the state habeas application, Trevino filed a petition for habeas corpus in the federal district court under 28 U.S.C. § 2254(a). JA6. As in the

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<sup>6</sup> Among other things, trial counsel testified that he had originally negotiated a plea agreement with the prosecution under which Trevino would not receive the death penalty, but that Trevino—after initially accepting the deal—ultimately rejected it. JA39-40. Trial counsel further testified that Trevino never denied participating in the offense and admitted he was present when Salinas was killed, but that “whenever defense counsel pressed [Trevino] about the facts of the offense, ... [Trevino] responded he was too stoned at the time of the offense to recall details.” *Id.* When asked about his efforts to develop a mitigation case, Trevino’s counsel said he had been unable “to get hold of” Trevino’s mother (even though “one time she was actually in the courtroom”) and that he did not remember Trevino’s aunt, the only witness who testified on behalf of Trevino at the punishment phase. JA392-393.

state-court proceedings, Trevino's habeas counsel undertook no review of trial counsel's failure to investigate and develop any mitigation evidence. *See* First Fed. Habeas Pet. (W.D. Tex. Mar. 14, 2002). He asserted only four claims for relief, all of which rested on the trial record and repeated arguments raised on direct appeal. *Id.*

On July 31, 2002, Trevino's habeas counsel filed a motion to withdraw for psychological and physical health reasons. JA6, JA514-515. The motion explained that counsel had grown increasingly ill "[o]ver the last few years," and that his doctor had "strongly urged" him to "discontinue death penalty writ cases as they greatly aggravate his existing medical condition." JA515. On August 14, 2002, the district court granted the motion to withdraw. JA6. The court appointed new counsel on September 3, 2002. JA7.

Trevino's new counsel undertook an independent mitigation investigation. That investigation revealed a wealth of evidence that would have been relevant to the jury's consideration of Trevino's moral culpability during the penalty phase of trial had trial counsel ever presented it. Specifically, Trevino's newly appointed habeas counsel uncovered evidence that:

- (1) [Trevino]'s mother was an emotionally unstable, physically abusive, alcoholic who abused alcohol throughout her pregnancy with [Trevino],
- (2) [Trevino] weighed only four pounds at birth and required considerable hospital care during his first few weeks of life,
- (3) for the rest of his life, petitioner suffered the deleterious effects of Fetal Alcohol Syndrome, as well as his mother's physical and emotional abuse,
- (4) [Trevino] suffered numerous serious



head injuries as a child for which he received little or no medical care due to the neglect of his mother and the absence of his father, (5) [Trevino] was exposed to alcohol and drug abuse from an early age and began abusing both alcohol and marijuana himself before he reached age twelve, (6) [Trevino] became involved in street gangs and street crime by age twelve, (7) [Trevino] experienced a lifetime of adversity, disadvantage, and disability, (8) [Trevino] attended school irregularly and performed poorly in school, and (9) [Trevino] suffers from impaired cognitive abilities.

JA66-67; *see also* JA479-581.

In light of this information, Trevino's new counsel sought to bring a claim for relief under *Wiggins v. Smith*, 539 U.S. 510 (2003), based on trial counsel's failure to investigate, develop, or present any of the newly discovered mitigating evidence at the penalty phase of Trevino's trial. On August 18, 2004, after obtaining a stay of the federal habeas proceedings, Trevino returned to state court and filed a second state habeas application to exhaust the *Wiggins* claim. JA3, JA7. On November 23, 2005, the Court of Criminal Appeals dismissed the application as an abuse of the writ because Trevino had failed to raise the *Wiggins* claim in his first application for state postconviction relief. JA27-28 (citing Tex. Code Crim. Proc. art. 11.071 § 5(a), (c)).

On December 8, 2008, Trevino filed an amended federal habeas petition in the district court raising

eight grounds for relief, including the *Wiggins* claim.<sup>7</sup> JA8, JA411-581. On December 21, 2009, the district court denied relief. JA29. The court held that the *Wiggins* claim was procedurally defaulted in light of the state court's dismissal of the claim as an abuse of the writ. JA67-69, JA78-79. The court further held that Trevino could not rely on the allegedly deficient performance of his state habeas counsel as cause to excuse the procedural default. JA69-70. The court also considered whether Trevino could satisfy the "fundamental miscarriage of justice" exception to the procedural-default doctrine. That test required "a colorable showing of factual innocence," JA70, meaning that, but for trial counsel's error, no reasonable juror would have found Trevino legally eligible for the death penalty, JA70-71 (discussing *Sawyer v. Whitley*, 505 U.S. 333 (1992)). The court found that Trevino could not meet that standard because the new evidence "focuse[d] almost exclusively" on the mitigation special issue, and not on Trevino's legal eligibility for the death penalty. JA72; see JA70-76.

In the alternative, the district court concluded that, even if the *Wiggins* claim were not defaulted, the newly discovered mitigation evidence "fails to satisfy the prejudice prong of [*Strickland v. Washington*, 466 U.S.

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<sup>7</sup> The district court had continued the stay since the dismissal of Trevino's second state habeas application so that Trevino could return again to state court to exhaust the *Brady* claim discussed above. See *supra* n.2. The state court took no action for two years on Trevino's motion for appointment of counsel. The federal district court thereafter found the state habeas process ineffective to protect Trevino's rights under 28 U.S.C. § 2254(b)(1) and excused petitioner's failure to exhaust the *Brady* claim. JA42. On October 2, 2008, the district court lifted the stay and set deadlines for completing the remainder of the federal habeas proceedings. *Id.*

668 (1984)].” JA76. Without conducting an evidentiary hearing, the court reweighed the mitigation evidence against the evidence in aggravation and found “no reasonable probability” that, but for trial counsel’s error, the outcome of the punishment phase would have been different. JA78. In reaching that conclusion, the court relied on what it perceived to be the “double-edged” nature of the new evidence and on Trevino’s failure to acknowledge his role in Linda Salinas’s death. JA76-78.

The district court granted certificates of appealability on three issues, including whether Trevino had satisfied the “fundamental miscarriage of justice” exception to the procedural-default rule with respect to his *Wiggins* claim. JA131-132. The court explained that:

[Trevino’s] federal habeas counsel has presented th[e] Court with evidence suggesting [Trevino] suffers from the effects of Fetal Alcohol Syndrome, including the inability to express remorse in a recognizable manner. Furthermore, [Trevino] has presented th[e] Court with evidence showing even the most minimal investigation into [his] background (through rudimentary interviews with family members and review of relevant school and medical records) would have revealed a wealth of additional mitigating evidence far more substantial tha[n] the superficial account of [Trevino]’s childhood given by [his] lone witness during the punishment phase of trial.

*Id.* Under those circumstances, “reasonable minds could disagree” as to whether Trevino had “satisfied the fundamental miscarriage of justice exception to the procedural default doctrine with regard to his *Wiggins* claim, i.e., [Trevino]’s complaint that his trial counsel

rendered ineffective assistance at the punishment phase of trial by failing to (1) adequately investigate petitioner's background and (2) discover, develop, and present available mitigating evidence." JA132.

#### D. Proceedings On Appeal

Trevino appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. On November 14, 2011, the court of appeals affirmed the district court's denial of habeas relief. JA134-164.<sup>8</sup> It agreed that Trevino's *Wiggins* claim was procedurally barred under Texas's abuse-of-the-writ doctrine and that Trevino could not demonstrate actual innocence to excuse the default. JA159-164. In so holding, the court acknowledged that "the volume of new evidence identified by Trevino is much greater than what was presented by his trial attorneys." JA162. "Notwithstanding the volume of this potentially mitigating evidence or the effect it might have had on the jury's sympathies," however, the court concluded that the evidence bore only on mitigation and not on Trevino's legal eligibility for the death penalty and thus did not "satisfy the demanding standard of 'actual innocence.'" *Id.*

The court of appeals did not review or address the district court's alternative holding as to whether Trevino could demonstrate prejudice under *Strickland*. See *supra* pp. 13-14. It instead relied solely on procedural default to dispose of Trevino's *Wiggins* claim. JA159-164. Nor did the court discuss whether ineffective assistance of state habeas counsel could serve as cause to excuse the procedural default.

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<sup>8</sup> Judge Dennis dissented as to Trevino's *Brady* claim. JA165-191.

By the time the court of appeals issued its decision, this Court had granted the petition for a writ of certiorari in *Martinez*, 131 S. Ct. 2960 (June 6, 2011).<sup>9</sup> Trevino accordingly filed a petition for panel rehearing asking the court to withdraw its opinion and stay further proceedings on the appeal pending the decision in *Martinez*. See Pet. for Panel Reh'g 1-2, 11 (5th Cir. Jan. 12, 2012). On January 31, 2012, the court of appeals denied the petition. JA192-193.<sup>10</sup>

This Court issued its decision in *Martinez* two months later. 132 S. Ct. 1309 (Mar. 20, 2012). *Martinez* considered an Arizona practice under which claims of ineffective assistance of trial counsel may not be raised on direct appeal, but instead must be reserved for state collateral proceedings. *Id.* at 1314; see *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002). The Court held that where state law makes “initial-review collateral proceedings” the first place a petitioner may raise a claim of ineffective assistance of trial counsel, a petitioner may rely on the ineffective assistance of counsel in that initial-review collateral proceeding as cause to excuse a procedural default. *Martinez*, 132 S. Ct. at 1315.

Trevino filed a petition for a writ of certiorari on April 30, 2012. The petition sought an order vacating the court of appeals’ judgment and remanding for con-

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<sup>9</sup> Trevino had previously alerted the court of appeals to the possibility that this Court would decide the issue it ultimately addressed in *Martinez*. See Reply Br. 12-13, 18 (5th Cir. Oct. 18, 2010) (noting this Court’s October 8, 2010 grant of a stay of execution in *Bradford v. Thaler*, No. 09-11519, which presented the question later decided in *Martinez*).

<sup>10</sup> Trevino filed a separate petition for rehearing en banc, which the court of appeals denied on January 31, 2012. JA192-193.



sideration of his *Wiggins* claim under *Martinez*.<sup>11</sup> After Trevino filed his petition, however, the court of appeals issued its decision in *Ibarra v. Thaler*, 687 F.3d 222 (June 28, 2012). As the State emphasized in opposing Trevino's petition for a writ of certiorari, *Ibarra* held that *Martinez* does not apply in federal habeas cases arising from Texas courts. See Opp. 13-14. The *Ibarra* court acknowledged the "clear" policy of the Texas Court of Criminal Appeals that "a state habeas petition is the preferred vehicle for developing ineffectiveness claims." 687 F.3d at 227. The court nonetheless noted that, "when practicable," Texas defendants may raise ineffectiveness claims in the trial court via a motion for new trial, and that Texas courts "sometimes" reach the merits of such claims on direct appeal. *Id.* The court therefore concluded that, unlike the Arizona system considered in *Martinez*, "Texas procedures do not *mandate* that ineffectiveness claims be heard in the first instance in habeas proceedings, and they do not by law deprive Texas defendants of counsel- and court-driven guidance in pursuing ineffectiveness claims." *Id.* (emphasis added). As a result, habeas petitioners in Texas are "not entitled to the benefit of *Martinez* for [their] ineffectiveness claims." *Id.*

This Court granted Trevino's petition for a writ of certiorari, limited to the question concerning the application of *Martinez*.

### SUMMARY OF ARGUMENT

I. In *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012), this Court held that, where collateral proceedings "provide the first occasion to raise a claim of infec-

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<sup>11</sup> The petition also sought review of the lower courts' rejection of Trevino's *Brady* claim. See *supra* n.2.



tive assistance at trial,” the ineffective assistance of counsel at such “initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance of counsel.” In death-penalty cases, the State of Texas has chosen systematically to channel claims of ineffective assistance of trial counsel to state habeas proceedings. That channeling renders state habeas proceedings “the first occasion” for a defendant to develop the record necessary to establish an ineffective-assistance-of-trial-counsel claim. Because Texas’s postconviction system presents the same considerations of comity and equity that informed this Court’s decision in *Martinez*, the rule of that case should apply equally in Texas.

A. The Texas Court of Criminal Appeals has repeatedly held that, “as a general rule, [a defendant] should *not* raise an issue of ineffective assistance of counsel on direct appeal.” *Mata v. State*, 226 S.W.3d 425, 430 n.14 (2007). This position reflects a recognition that, “in the vast majority of cases, the undeveloped record on direct appeal will be insufficient” for a defendant to raise a claim of ineffective assistance of counsel. *Thompson v. State*, 9 S.W.3d 808, 814 n.6 (Tex. Crim. App. 1999). That is particularly true given that ineffective-assistance-of-counsel claims—especially *Wiggins* claims like Trevino’s—must be supported with extra-record evidence. See *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

In Texas death-penalty cases, the duty and resources to develop such evidence have been assigned to state habeas counsel, not appellate counsel. To expedite the review of death-sentenced inmates’ claims for relief, Texas has implemented a dual-track procedure that requires that separate counsel be appointed for direct appeals and state habeas proceedings, which are

litigated simultaneously. *See* Habeas Corpus Reform Act, 1995 Tex. Sess. Law Serv. ch. 319, § 1. Texas law assigns state habeas counsel—and not appellate counsel—the duty to conduct an independent investigation of any potential collateral claims. Tex. Code Crim. Proc. art. 11.071 § 3(a). Since 1999, Texas law has provided funding specifically for such an investigation. *Id.* art. 11.071 § 2A(a) (App. 3a). The dual-track procedure thus systematically channels ineffective-assistance-of-trial-counsel claims in death-penalty cases to state habeas review. In Texas, as in Arizona, state habeas proceedings therefore “provide the first occasion” for a death-sentenced inmate to develop the record required to establish a claim of ineffective assistance of trial counsel. *Martinez*, 132 S. Ct. at 1315.

B. The reasoning of *Martinez* applies with full force in Texas cases. The procedural-default doctrine rests on “respect for state procedural rules,” *Coleman v. Thompson*, 501 U.S. 722, 747 (1991), including those that “channel[], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently,” *Murray v. Carrier*, 477 U.S. 478, 491 (1986). Here, as in Arizona, Texas has made a “deliberate[] cho[ice]” to channel death-sentenced inmates’ ineffective-assistance-of-trial-counsel claims “outside of the direct-appeal process” and into collateral proceedings. *Martinez*, 132 S. Ct. at 1318. This Court should apply its procedural-bar rules—and the exception recognized in *Martinez*—in a manner that reinforces that choice. *See Massaro v. United States*, 538 U.S. 500, 504 (2003). Holding *Martinez* inapplicable in Texas cases would encourage Texas prisoners under a sentence of death to do precisely what the Texas courts and legislature have said they should not do: direct their claims of ineffec-

tive assistance of counsel to appellate courts on direct review.

In addition, Texas's channeling of ineffective-assistance-of-trial-counsel claims to collateral review implicates the same equitable considerations as the Arizona system at issue in *Martinez*. See 132 S. Ct. at 1317-1318. Texas has designed a system, like Arizona, where in the vast majority of death-penalty cases the state habeas court is the first court to examine the merits of an ineffective-assistance-of-trial-counsel claim—particularly where, as here, the claim requires extensive extra-record factual development. If state habeas counsel's failure to raise such a claim results in the claim being procedurally defaulted during the federal habeas proceeding, no court will ever review the claim, and substantial defects in the very fairness of a prisoner's trial may go unredressed.

C. Contrary to the court of appeals' decision in *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012), the fact that there are rare exceptions to Texas's channeling of ineffective-assistance claims to collateral review does not meaningfully distinguish the Texas system from Arizona's for purposes of *Martinez*. In the vast majority of cases, Texas makes it virtually impossible to litigate such claims on a motion for new trial. The time limits and other constraints Texas has placed on such motions generally preclude a defendant from developing any claims that require significant extra-record investigation. The theoretical possibility that a defendant may try to raise an ineffective-assistance-of-trial-counsel claim in a direct appeal—particularly where the system, by design, precludes the development of any factually and legally substantial claim under this Court's ineffective-assistance jurisprudence—

is an insufficient ground for refusing to apply the *Martinez* rule.

II. Under *Martinez*, a habeas petitioner seeking to excuse procedural default caused by ineffective assistance of counsel in an initial-review collateral proceeding “must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that ... the claim has some merit.” 132 S. Ct. at 1318-1319 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). Here, Trevino has a “substantial” ineffective-assistance-of-trial-counsel claim that should have been raised in his first state habeas petition.

It is well established that trial counsel’s complete failure to investigate, develop, or present mitigating evidence at the penalty phase of a capital trial constitutes deficient performance. See *Wiggins v. Smith*, 539 U.S. 510, 523-534 (2003); *Williams v. Taylor*, 529 U.S. 362, 390-391 (2000); *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Trevino’s trial counsel failed to conduct any mitigation investigation at all. Had he done so, the “wealth of evidence” of severe childhood abuse and neglect and the lasting effects of fetal alcohol syndrome that Trevino suffered—all uncovered later by federal habeas counsel—might very well have influenced the jury’s assessment of Trevino’s moral culpability. The evidence could potentially have led at least one juror to conclude that Trevino should have been sentenced to life in prison rather than death. The ineffectiveness of Trevino’s state habeas counsel, however, prevented Trevino from raising this claim in compliance with Texas’s procedural rules. This Court should reverse the judgment below and permit Trevino to pursue his claim under the equitable exception recognized in *Martinez*.



## ARGUMENT

### I. *MARTINEZ* V. *RYAN* APPLIES IN DEATH-PENALTY CASES ARISING FROM TEXAS COURTS

#### A. Like Arizona, Texas Channels Claims Of Ineffective Assistance Of Trial Counsel To Collateral Review

1. *Martinez* involved an Arizona prisoner who sought federal habeas relief on the ground that his trial counsel had rendered ineffective assistance by failing to challenge certain prosecution evidence or to pursue certain defenses. *Martinez v. Ryan*, 132 S. Ct. 1309, 1314 (2012). In Arizona, the state supreme court had long recommended that such claims be brought in post-conviction proceedings. *See State v. Spreitz*, 39 P.3d 525, 526 (Ariz. 2002). In 2002, as practitioners continued to ignore these “repeated requests,” the state supreme court “clarif[ied]” that “ineffective assistance of counsel claims are to be brought in [collateral] proceedings” and that “[a]ny such claims improvidently raised in a direct appeal, henceforth, [would] not be addressed by appellate courts regardless of merit.” *Id.* at 527.

Consistent with that instruction, *Martinez*’s appellate counsel raised no ineffective-assistance claim on direct appeal. 132 S. Ct. at 1314. Neither, however, did counsel do so in *Martinez*’s first state habeas proceeding. *Id.* When new counsel finally raised the ineffective-assistance claim in a second postconviction proceeding, the state court dismissed the claim due to *Martinez*’s failure to raise it in the first state habeas petition. *Id.* As a result of that ruling, when *Martinez* sought federal habeas relief on the same ground, the district court dismissed the claim as procedurally defaulted. *Id.* at 1314-1315. *Martinez* sought to excuse the default based on the alleged ineffectiveness of his

first state habeas counsel. But the court of appeals affirmed, holding that, under *Coleman v. Thompson*, 501 U.S. 722, 753-754 (1991), “an attorney’s errors in the [state collateral] proceeding do not establish cause for a procedural default.” *Martinez*, 132 S. Ct. at 1315; see *Martinez v. Schriro*, 623 F.3d 731, 736 (9th Cir. 2010).

On review, this Court recognized a “narrow exception” to “the unqualified statement in *Coleman* that an attorney’s ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default.” *Martinez*, 132 S. Ct. at 1315. That exception is available when the alleged errors of habeas counsel occur at an “initial-review collateral proceeding”—that is, a collateral proceeding that “provide[s] the first occasion to raise a claim of ineffective assistance at trial.” *Id.* Where a federal habeas petitioner shows that he received “[i]nadequate assistance of counsel at initial-review collateral proceedings,” the showing “may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Id.* In support of that holding, the Court relied on the fact that Arizona had “deliberately cho[sen] to move trial-ineffectiveness claims outside of the direct-appeal process.” *Id.* at 1318. And the Court emphasized the similarities between the initial-review collateral proceeding and direct appeal, including the difficulty an uncounseled prisoner would face in either proceeding in attempting to vindicate a substantial ineffective-assistance-of-trial-counsel claim. *Id.* at 1317.

Thus, under *Martinez*, “when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim” by showing that “appointed counsel in the initial-review collateral proceeding, where the claim should



have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984).” 132 S. Ct. at 1318. “To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Id.* at 1318-1319 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)).

2. Like Arizona, Texas has made a “deliberate[] cho[ice]” to channel ineffective-assistance-of-trial-counsel claims to initial-review collateral proceedings. *Martinez*, 132 S. Ct. at 1318. The Texas Court of Criminal Appeals has repeatedly admonished that “as a general rule, [a defendant] should *not* raise an issue of ineffective assistance of counsel on direct appeal.” *Mata v. State*, 226 S.W.3d 425, 430 n.14 (2007) (quoting *Jackson v. State*, 877 S.W.2d 768, 772 (Tex. Crim. App. 1994) (Baird, J., concurring)). Rather, “in almost all cases,” ineffective-assistance claims should be pursued in postconviction proceedings. *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). Thus, in *Thompson v. State*, 9 S.W.3d 808, 809, 813-815 (Tex. Crim. App. 1999), for example, the Court of Criminal Appeals held that the intermediate appellate court had “erred by addressing appellant’s claim of ineffective counsel,” and that the appellant’s claim should instead be left for consideration on an application for habeas corpus. *See also, e.g., Bone v. State*, 77 S.W.3d 828, 830, 833-837 (Tex. Crim. App. 2002) (reversing judgment of intermediate appellate court that found ineffective assistance of trial counsel; such claims should ordinarily not be brought or decided on direct appeal).

The Texas courts have developed that policy in recognition of the fact that “in the *vast majority* of cases, the undeveloped record on direct appeal will be

insufficient” for a defendant to raise or a court to evaluate a claim of trial ineffectiveness. *Thompson*, 9 S.W.3d at 814 n.6 (emphasis added).<sup>12</sup> To prevail, such claims must be “firmly founded in the record.” *Ex parte Varelas*, 45 S.W.3d 627, 629 (Tex. Crim. App. 2001); see *Bone*, 77 S.W.3d at 835 (the record “must itself affirmatively demonstrate the alleged ineffectiveness”). And that record must include not only the trial record itself, but also, at a minimum, evidence of trial counsel’s tactical decisions. See, e.g., *Goodspeed v. State*, 187 S.W.3d 390, 391-392 (Tex. Crim. App. 2005) (reversing finding of ineffectiveness where the lower court did not conduct “an inquiry into the reasons for counsel’s conduct”); *Bone*, 77 S.W.3d at 830 (“We are once again asked whether an appellate court may reverse a conviction on ineffective assistance of counsel grounds when counsel’s actions or omissions may have been based upon tactical decisions, but the record contains no specific explanation for counsel’s decisions. Once again we answer that question ‘no.’” (footnote omitted)). Given these requirements, the Texas Court of Criminal Appeals has concluded that “a writ of habeas corpus is essential to gathering the facts necessary to adequately evaluate such claims.”

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<sup>12</sup> See also, e.g., *Mata*, 226 S.W.3d at 430 (“As we have said on more than one occasion, a reviewing court on direct appeal will rarely be able to fairly evaluate the merits of an ineffective-assistance claim, because the record on direct appeal is usually undeveloped and inadequately reflective of the reasons for defense counsel’s actions at trial.”); *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (finding record insufficient to adjudicate claim without testimony of counsel); *Ex parte Brown*, 158 S.W.3d 449, 453 (Tex. Crim. App. 2005) (“As with the vast majority of claims of ineffective assistance of counsel, the trial record is insufficient to allow an appellate court to resolve the issue.” (emphasis added)).

*Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). A postconviction proceeding is therefore “the preferred method” for developing and presenting an ineffective-assistance claim. *Robinson v. State*, 16 S.W.3d 808, 810 (2000).

When defendants do raise ineffective-assistance claims on direct appeal, Texas courts routinely dismiss those claims without prejudice to the defendant’s right to present the issue on collateral review. *See, e.g., Rylander v. State*, 101 S.W.3d 107, 111 & n.1 (Tex. Crim. App. 2003) (finding record insufficient to support appellant’s ineffective-assistance claim, but noting that appellant may submit the claim in application for habeas corpus); *Robinson*, 16 S.W.3d at 813 n.7 (“proper procedure” is for the appellate court to overrule ineffective-assistance claims “without prejudice to appellant’s ability to dispute counsel’s effectiveness collaterally,” except in “the rare case where the record on direct appeal is sufficient to prove that counsel’s performance was deficient”); *Torres*, 943 S.W.2d at 475 (rejection of ineffective-assistance claim on direct appeal “does not bar relitigation of [the] claim on habeas corpus” because “direct appeal cannot be expected to provide an adequate record to evaluate the claim in question, and the claim might be substantiated through additional evidence gathering in a habeas corpus proceeding”). This practice applies especially in death-penalty cases.<sup>13</sup> It

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<sup>13</sup> *See, e.g., Lopez v. State*, 2012 WL 5358863, at \*9-10 (Tex. Crim. App. Oct. 31, 2012); *Velez v. State*, 2012 WL 2130890, at \*35 (Tex. Crim. App. June 13, 2012); *Estrada v. State*, 313 S.W.3d 274, 310-311 (Tex. Crim. App. 2010); *Tabler v. State*, 2009 WL 4931882, at \*3-4 (Tex. Crim. App. Dec. 16, 2009); *Beatty v. State*, 2009 WL 619191, at \*10 (Tex. Crim. App. Mar. 11, 2009); *Thomas v. State*, 2008 WL 4531976, at \*15 (Tex. Crim. App. Oct. 8, 2008); *Garza v. State*, 2008 WL 1914673, at \*4-5 (Tex. Crim. App. Apr. 30, 2008);

is only in “extremely unusual circumstance[s]” that “the record [will] contain[] all the information that [the court] need[s] to make a decision” on direct review. *Andrews*, 159 S.W.3d at 103 (in a “rare case,” finding record sufficient to support ineffective-assistance claim where defense counsel failed to object to prosecutor’s clear misstatement of law during closing argument).<sup>14</sup>

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*Roberts v. State*, 220 S.W.3d 521, 533-534 (Tex. Crim. App. 2007); *Garza v. State*, 213 S.W.3d 388, 347-348 (Tex. Crim. App. 2007); *Reynoso v. State*, 2005 WL 3418293, at \*3 (Tex. Crim. App. Dec. 14, 2005); *Dickson v. State*, 2001 WL 34736485, at \*6 (Tex. Crim. App. Oct. 13, 2004); *Hamilton v. State*, 2004 WL 3094382, at \*5 (Tex. Crim. App. Oct. 13, 2004); *Will v. State*, 2004 WL 3093238, at \*6 (Tex. Crim. App. Apr. 21, 2004); *Sigala v. State*, 2004 WL 231326, at \*11-12 (Tex. Crim. App. Jan. 14, 2004); *Perkins v. State*, 2004 WL 3093239, \*8 (Tex. Crim. App. June 30, 2004); *Ortiz v. State*, 93 S.W.3d 79, 88-89 (Tex. Crim. App. 2002); *Whitaker v. State*, 977 S.W.2d 595, 599 (Tex. Crim. App. 1998); *see also Varelas*, 45 S.W.3d at 632 (granting trial-ineffectiveness claim on habeas review that had been dismissed without prejudice on direct appeal); *compare also, e.g., Sprouse v. State*, 2007 WL 283152, at \*6-8 (Tex. Crim. App. Jan. 31, 2007) (rejecting ineffective-assistance claim on direct review), *with Ex parte Sprouse*, 2007 WL 1839481, at \*1-2 (Tex. Crim. App. June 27, 2007), *and* 2010 WL 374959, at \*1 (Tex. Crim. App. Feb. 3, 2010) (adjudicating claim in habeas); *compare Scheanette v. State*, 144 S.W.3d 503, 509 (Tex. Crim. App. 2004) (finding record insufficient to adjudicate claim on direct review), *with Ex parte Scheanette*, 2005 WL 3429304, at \*1 (Tex. Crim. App. Dec. 14, 2005) (adjudicating claim in habeas); *compare Thompson v. State*, 2003 WL 21466925, at \*2-3 (Tex. Crim. App. June 25, 2003) (finding record insufficient to adjudicate claim on direct review), *with Ex parte Thompson*, 179 S.W.3d 549, 557-560 (Tex. Crim. App. 2005) (adjudicating claim in habeas).

<sup>14</sup> At the opposite extreme from *Andrews*, Texas courts will sometimes deny relief on an ineffective-assistance claim on direct appeal where the claim’s lack of merit is patent from the trial record and additional extra-record evidence would be irrelevant. *See, e.g., Ladd v. State*, 3 S.W.3d 547, 565 (Tex. Crim. App. 1999) (rejecting ineffective-assistance claim that challenged trial coun-



Consistent with this practice, unsurprisingly, Texas prisoners sentenced to death overwhelmingly raise their claims of ineffective assistance of trial counsel—and the Court of Criminal Appeals adjudicates those claims—for the first time during state habeas proceedings. *See, e.g., Ex parte Runnels*, 2011 WL 2377697, at \*1 (June 8, 2011), and 2012 WL 739257, at \*1 (Mar. 7, 2012); *Ex parte Allen*, 2010 WL 1709947, at \*1 (Apr. 28, 2010); *Ex parte Vasquez*, 2009 WL 3842857, at \*1 (Nov. 18, 2009); *Ex parte Burton*, 2009 WL 874202, at \*1 (Apr. 1, 2009); *Ex parte Quintanilla*, 2008 WL 2403739, at \*1 (June 4, 2008); *Ex parte Woods*, 176 S.W.3d 224, 225-228 (2005); *Ex parte Threadgill*, 2005 WL 2445431, at \*1 (Oct. 5, 2005). Moreover, it is only in state habeas proceedings that death-sentenced prisoners in Texas have *ever* been successful in developing an adequate record to prove meritorious claims of ineffective assistance under *Wiggins*. *See, e.g., Ex parte Lucero*, 2010 WL 3582978, at \*1 (Tex. Crim. App. Sept. 15, 2010) (granting writ on *Wiggins* claim); *Ex parte Kerr*, 2009 WL 874005, at \*2 (Tex. Crim. App. Apr. 1, 2009) (same); *Ex parte Gonzales*, 204 S.W.3d 391, 393-400 (Tex. Crim. App. 2006) (same).

3. In death-penalty cases, the Texas Court of Criminal Appeals' instruction that defendants "should not" raise ineffective-assistance claims on direct appeal, *Mata*, 226 S.W.3d at 430 n.14, both reflects and reinforces the statutes, rules, and prevailing professional norms that govern the conduct of postconviction review. As discussed, *supra* pp. 7-8, in 1995, the state

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sel's failure to object to a jury instruction where there was no error in the jury instruction). Even in those cases, however, the defendant is not barred from raising the claim again, supported with additional evidence, on collateral review. *See supra* p. 26.

legislature enacted a dual-track system of simultaneous direct and collateral review for defendants sentenced to death. Within that parallel system, the division of responsibilities and resources between appellate and habeas counsel demonstrates how Texas channels ineffective-assistance claims in death-penalty cases to collateral review.

As the legislature recognized in enacting the dual-track system, the direct appeal deals with “errors of law [that] occurred in the trial” and is generally “limited to issues raised in the original trial.” House Research Organization, Bill Analysis, Senate Bill 440, at 1 (May 18, 1995) (“S.B. 440 Analysis”); *see also Tha Dang Nguyen v. State*, 359 S.W.3d 636, 643-644 (Tex. Crim. App. 2012) (citing House Research Organization bill analysis as evidence of legislative intent under Texas law). The trial court must appoint appellate counsel “[a]s soon as practicable after [the] death sentence is imposed.” Tex. Code Crim. Proc. art. 26.052(j). Once appointed, appellate counsel must file the notice of appeal within 30 days after sentence is imposed or within 90 days if the defendant files a motion for new trial. Tex. R. App. P. 26.2(a). “Only trial record issues and evidence are allowed at [direct] appeal.” Texas House of Representatives, Comm. on Criminal Jurisprudence, *Interim Report to the 74th Texas Legislature* 53 (Nov. 1994) (“1994 Interim Report”). And a defendant may raise only those arguments that were “made to the trial court by a timely request, objection, or motion,” including a motion for new trial. Tex. R. App. P. 33.1(a); *see id.* R. 21.2. Given these requirements and limitations, prevailing professional norms require appellate counsel only to “fully review the appellate record for all reviewable errors” and “prepar[e] a well-researched and drafted appellate brief” addressing those errors. State



Bar of Texas, *Guidelines and Standards for Texas Capital Counsel*, 69 Tex. Bar J. 966, 976 (2006) ("SBOT Guidelines").

By contrast, the Texas legislature has placed the burden of investigating and developing trial-ineffectiveness claims in death-penalty cases on state habeas counsel. Under Article 11.071, absent a valid waiver, habeas applicants in death-penalty cases "shall be represented by competent counsel," who must be appointed no later than 30 days after the trial court determines whether the defendant is indigent and wishes to have counsel appointed for the purpose of a writ of habeas corpus. Tex. Code Crim. Proc. art. 11.071 § 2(a), (c) (App. 1a).<sup>15</sup> Upon appointment, habeas counsel "shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus." *Id.* § 3(a); see 43B *Texas Practice* § 58:66 (describing duties of habeas counsel).<sup>16</sup> That investigation is critical because in most

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<sup>15</sup> As noted, at the time of Trevino's trial, the statute required that habeas counsel be appointed "at the earliest practical time" after determination of the defendant's indigency. Tex. Code Crim. Proc. art. 11.071 § 2(b), (d) (1996); see *supra* n.4.

<sup>16</sup> See also 1994 Interim Report 53 (unlike an appellant on direct appeal, a defendant in a habeas corpus proceeding "is allowed to present evidence and arguments that were not presented at the original trial"); House Research Organization, Bill Analysis, Senate Bill 1091, at 1 (May 18, 2009) ("direct appeal ... deals with errors of law in the original trial," while habeas proceeding "can raise issues outside the trial record ... such as the effectiveness of counsel"); SBOT Guidelines, 69 Tex. Bar J. at 976 (unlike appellate counsel, "habeas corpus counsel cannot rely on the previously compiled record, but must conduct a thorough and independent investigation" and "must not assume that the trial record presents either a complete or accurate picture of the facts and issues").

cases, as one legislative report explained, “[h]abeas proceedings are a prisoner’s only opportunity to raise” claims based on evidence outside the trial record, including “ineffective assistance of trial counsel.” Senate Research Center, Author’s/Sponsor’s Statement of Intent, S.B. 1091, at 1-2 (Aug. 11, 2009); *S & P Consulting Eng’rs, PLLC v. Baker*, 334 S.W.3d 390, 399-400 (Tex. App. 2011) (citing Senate Research Center Author’s/Sponsor’s Statement of Intent as evidence of legislative intent under Texas law).<sup>17</sup>

By statute, Texas has provided special funding to state habeas counsel to investigate and develop extra-record claims. Texas provides for prepayment from county funds of all anticipated “expenses, including expert fees, to investigate and present potential habeas corpus claims.” Tex. Code Crim. Proc. art. 11.071 § 3(b) (App. 3a-4a). Counsel may also obtain reimbursement for investigation expenses incurred without prior approval. *Id.* § 3(d) (App. 4a). Since 1999, the State has provided up to \$25,000 per habeas application to reimburse counties that compensate habeas counsel for these investigation expenses in death-penalty cases. See 1999 Tex. Sess. Law Serv. ch. 803; Tex. Code. Crim.

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<sup>17</sup> The legislature recently enacted further reforms to ensure that Texas inmates sentenced to death have access to experienced counsel to conduct a thorough investigation. See 2009 Tex. Sess. Law Serv. ch. 781. That 2009 legislation was prompted by studies that “revealed pervasive flaws in the quality of legal representation for indigent defendants in the state habeas system,” including the frequent “failure” by habeas counsel “to investigate and present non-record evidence.” Senate Research Center, Author’s/Sponsor’s Statement of Intent, S.B. 1091, at 1 (Aug. 11, 2009). In an effort to remedy these problems, the 2009 legislation established the Office of Capital Writs, a statewide office of lawyers to represent indigent defendants in death-penalty habeas corpus proceedings.

Proc. art. 11.071 § 2A(a); S.B. 440 Analysis 8 (“Allowing for the payment of expenses, including expert fees, to investigate habeas corpus claims, would ensure that defendants are provided with the resources to mount a fair and thorough defense.”).<sup>18</sup>

The State Bar’s guidelines for attorneys appointed in death-penalty cases highlight the degree to which extra-record claims, including ineffective assistance of trial counsel, are the responsibility of habeas counsel and not appellate counsel under the Texas system. Consistent with the statutory scheme, “[h]abeas corpus counsel must promptly obtain the investigative resources necessary to examine both phases, including the assistance of a fact investigator and a mitigation specialist, as well as any appropriate experts.” SBOT Guidelines, 69 Tex. Bar J. at 977; *see id.* at 980-981 (describing appropriate mitigation investigation); *id.* at 976 (“habeas corpus demands” a “comprehensive extra-record investigation”). As part of that investigation, habeas counsel is expected to “obtain the files of trial and appellate counsel, scrutinizing them for what is missing as well as what is present.” *Id.* at 977. Habeas counsel is specifically expected to “conduct a searching inquiry to assess whether any constitutional violations may have taken place, including ... ineffective assistance of trial and appellate counsel.” *Id.* at 976-977. Indeed, the Guidelines advise that:

[b]ecause state habeas corpus is *the first opportunity for a capital client to raise challenges to*

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<sup>18</sup> In contrast, appellate counsel is compensated only “from county funds” in the same manner as trial counsel, “based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel.” Tex. Code Crim. Proc. art. 26.052(l) (App. 9a); *id.* art. 26.05(a) (App. 6a-7a).

*the effectiveness of trial or direct appeal counsel*, state habeas corpus counsel should not accept the appointment if he or she represented the client at the capital murder trial or on direct appeal of the capital conviction and death sentence.

*Id.* at 977 (emphasis added).

Texas's dual-track system for death-penalty cases thus reflects a legislative choice to channel claims requiring evidence outside the trial record into collateral proceedings instead of direct appeal. The Texas Court of Criminal Appeals has actively and consistently directed habeas petitioners and practitioners not to raise ineffective-assistance claims on direct review and routinely refuses to adjudicate such claims when they are raised on appeal. And practitioners working within that system understand that it is the habeas corpus proceeding, not direct appeal, where an ineffective-assistance-of-trial-counsel claim must be developed and litigated.<sup>19</sup> As in Arizona, the first habeas corpus proceeding is thus the "first occasion" for a defendant to

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<sup>19</sup> The Texas Attorney General's Office itself has explained that habeas review "differ[s] from the direct appeal in that the defendant may raise claims based on facts outside the trial record (for example, ineffective assistance of trial counsel)." Office of the Attorney General of Texas, *Capital Punishment Appellate Guide Book 5*, available at [https://www.oag.state.tx.us/AG\\_Publications/pdfs/appellate2006.pdf](https://www.oag.state.tx.us/AG_Publications/pdfs/appellate2006.pdf) (last visited Dec. 12, 2012). Similarly, a manual for Texas prosecutors published by the Texas District and County Attorneys Association explains that the direct appeal is "limited to the written, appellate record," while the habeas proceeding addresses factual claims "not[] reflected in the appellate record," including ineffective assistance of counsel. Wilson, *Capital Writs* 16 (2002) (citing *Robinson*, 16 S.W.3d at 813 n.7); see *id.* at 48.



expand the record as required to establish a claim of ineffective assistance at trial and is properly treated as an "initial-review collateral proceeding" within the meaning of *Martinez*.

**B. The Reasoning Of *Martinez* Applies Equally To Texas Death-Penalty Cases**

*Martinez* recognized a narrow equitable exception to the procedural-default doctrine, and the scope of that exception is informed by the purposes underlying both the exception and the rule. Because Texas, like Arizona, systematically channels ineffective-assistance-of-trial-counsel claims into initial-review collateral proceedings in death-penalty cases, the rationales this Court relied on in *Martinez* apply with equal force to the Texas system.

**1. Applying *Martinez* to Texas death-penalty cases advances the purposes of the procedural-default doctrine**

The procedural-default doctrine is "grounded in concerns of comity and federalism." *Coleman*, 501 U.S. at 730. Its objective is to promote "the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Id.* at 726. When a prisoner fails to follow those procedural rules, he "deprive[s] the state courts of an opportunity to address those claims in the first instance." *Id.* at 732; *see id.* at 748. And he undermines the "vital purpose" of those procedural rules: to "channel[], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which," in the State's judgment, "they can be resolved most fairly and efficiently." *Murray v. Carrier*, 477 U.S. 478, 490-491

(1986) (quoting *Reed v. Ross*, 468 U.S. 1, 10 (1984)); see also *Coleman*, 501 U.S. at 750 (emphasizing States' interest in "channeling the resolution of claims to the most appropriate forum").

Consistent with these purposes, the *Martinez* exception gave effect to Arizona's "deliberate[] cho[ice]" to channel ineffective-assistance claims into initial-review collateral proceedings. 132 S. Ct. at 1318. Procedural default is ordinarily enforced against a prisoner who "fail[s] to abide by a state procedural rule." *Id.* at 1316. A prisoner who waits to raise an ineffective-assistance claim in an initial-review collateral proceeding is not flouting but seeking to act "in accordance with the State's procedures." *Id.* at 1317 (emphasis added). And when he is impeded from following the State's procedures only because his state habeas counsel performs ineffectively, a rule that treats the collateral proceeding as the equivalent of a direct appeal for purposes of excusing the default respects the State's procedural choice. *Id.* at 1318-1319.

The same respect is called for here. As shown, *supra* pp. 24-34, Texas has determined that the trial-ineffectiveness claims of state prisoners sentenced to death "can be resolved most fairly and efficiently" in a habeas corpus proceeding. *Murray*, 477 U.S. at 491. And so, like Arizona, Texas has channeled those claims in death-penalty cases "outside of the direct-appeal process" and into initial-review collateral proceedings. *Martinez*, 132 S. Ct. at 1318. Applying *Martinez* in Texas death-penalty cases gives effect to that choice. Doing so does not reward prisoners who flout Texas's procedural scheme, but instead assures prisoners that they will not be prejudiced by complying with the State's preference. In contrast, refusing to treat state habeas counsel's ineffectiveness in the initial-review



collateral proceeding as cause to excuse a procedural default would encourage death-sentenced defendants to do precisely what Texas does *not* want them to do: pursue claims on direct appeal that the State has deemed inappropriate at that stage. Procedural-default rules “should be designed to induce litigants to present their contentions to the right tribunal at the right time.” *Massaro v. United States*, 538 U.S. 500, 504 (2003). Texas has determined that the “right time” to challenge trial counsel’s ineffectiveness in death-penalty cases is in initial-review collateral proceedings. Applying *Martinez* in Texas death-penalty cases thus best serves the objectives of the procedural-default doctrine.

## 2. The equitable considerations underlying *Martinez* are equally present here

Ordinarily, under *Coleman*, “[n]egligence on the part of a prisoner’s postconviction attorney does not qualify as cause” to excuse a procedural default. *Martinez*, 132 S. Ct. at 1325 (quoting *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012) (other internal quotation marks omitted)). Attorney error on direct appeal, however, may provide cause. And, as *Martinez* emphasized, an initial-review collateral proceeding that is the “first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial” is “in many ways the equivalent of a prisoner’s direct appeal.” 132 S. Ct. at 1317. In particular, in an initial-review collateral proceeding, as in a direct appeal,

“the state habeas court looks to the merits of the clai[m]” of ineffective assistance, no other court has addressed the claim, and “defendants pursuing first-tier review ... are generally ill equipped to represent themselves” because

they do not have a brief from counsel or an opinion of the court addressing their claim of error.

*Id.* (quoting *Halbert v. Michigan*, 545 U.S. 605, 617 (2005)). Those similarities supported the exception to procedural default recognized in *Martinez* and also mark a “key difference” between “initial-review” collateral proceedings and other collateral proceedings. *Id.* at 1316. Unlike other proceedings, “[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner’s claim.” *Id.* *Martinez* thus “acknowledge[d], as an equitable matter, that [an] initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not [be] sufficient to ensure that proper consideration [is] given to a substantial claim” of trial ineffectiveness. *Id.* at 1318.

Texas’s procedural scheme implicates these same considerations. First, “in almost all cases” where a defendant in a death-penalty case alleges ineffective assistance of trial counsel, the state habeas court will both address the merits of the claim and be the first court to do so. *Andrews*, 159 S.W.3d at 102; *see supra* pp. 24-28. If such a claim is raised on direct appeal, Texas courts will routinely dismiss the claim without prejudice, not because it lacks merit, but because—in the “vast majority” of cases—the record is inadequate to adjudicate it. *Thompson*, 9 S.W.3d at 814 n.6; *see also, e.g., Ex parte Brown*, 158 S.W.3d 449, 453 (Tex. Crim. App. 2005); *Varelas*, 45 S.W.3d at 629-630, 632; *see supra* pp. 26-27 & n.13. (That will *always* be the case for potentially meritorious claims under *Wiggins*, *see infra* p. 42 & n.21.) Thus, in Texas, as in Arizona, with rare exceptions, no other court will address the claim except the habeas court in collateral proceedings,

and if counsel's errors in that proceeding "do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Martinez*, 132 S. Ct. at 1316.

Moreover, in death-penalty cases, the Texas legislature has assigned the task of extra-record investigation to state habeas counsel. Appellate counsel is neither required nor expected to develop or present a claim of ineffective assistance of counsel on direct appeal. *See supra* pp. 29-33. As in Arizona, death-sentenced Texas prisoners pursuing such a claim through a state habeas proceeding thus will ordinarily lack the benefit of a brief or record from appellate counsel or an opinion of the court addressing that claim. Such prisoners will be ill-equipped to represent themselves if their state habeas counsel performs ineffectively. *See Martinez*, 132 S. Ct. at 1317.

Indeed, as *Martinez* noted, a prisoner who lacks "the help of an adequate attorney" in seeking to vindicate a claim of trial ineffectiveness in the initial-review collateral proceeding will face the same difficulties that prompted the Court in *Coleman* to recognize that attorney error on direct appeal may provide cause to excuse procedural default. 132 S. Ct. at 1317. Without adequate counsel in the initial-review collateral proceeding, the prisoner may be equally "denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims." *Id.* (citing *Coleman*, 501 U.S. at 754). That result is of "particular concern" with regard to a claim of ineffective assistance of trial counsel. *Id.* Such a claim concerns a "bedrock principle in our justice system" that is essential to the assurance of a fair trial. *Id.* And presenting such a claim for the first time on collateral review may be extremely difficult without adequate

counsel to assist in investigating and developing its factual basis—particularly where, as here, the claim is a *Wiggins* claim requiring substantial extra-record evidence. *Id.*; see *Massaro*, 538 U.S. at 505. These considerations supported the Court’s “equitable judgment” in *Martinez*, 132 S. Ct. at 1318, and they apply with equal force here.

**C. Contrary To *Ibarra v. Thaler*, The Availability Of A Motion For New Trial Does Not Warrant A Different Rule**

In *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012), the court of appeals acknowledged that the Texas Court of Criminal Appeals has “made clear that a state habeas petition is the preferred vehicle for developing ineffectiveness claims.” The court nonetheless refused to apply *Martinez* in Texas cases, on the ground that Texas prisoners may attempt to raise ineffectiveness claims “when practicable” through a motion for new trial and Texas courts “sometimes reach the merits of [those] claims on direct appeal.” *Id.* (emphasis added). The court thus drew a line between Arizona’s absolute “mandate” and the Texas system, which channels ineffective-assistance claims to collateral proceedings, but permits appellate courts to adjudicate such claims on direct review in exceptional cases. *Id.* This Court should reject that reasoning.

1. **Under Texas’s chosen procedures, a motion for new trial is almost never a viable option for establishing ineffective-assistance claims in death-penalty cases**

The trial record alone is an inadequate basis for litigating and deciding potentially meritorious ineffective-assistance claims in all but the most “extremely



unusual circumstances.” *Andrews*, 159 S.W.3d at 103. Texas courts will therefore adjudicate such claims on direct appeal only where the defendant first expands the record through a motion for new trial. Texas never encourages this approach—in fact, it discourages it. *See supra* pp. 24-34. In any event, Texas’s procedural rules make it impossible or impracticable to utilize this procedure in death-penalty cases. That fact merely underscores that Texas did not intend for ineffective-assistance claims to be brought on motions for a new trial in such cases.

Texas requires that a motion for new trial be filed within 30 days after the trial court imposes sentence. Tex. R. App. P. 21.4(a). The motion must be presented to the court within ten days of filing. *Id.* R. 21.6. The 30-day deadline may not be extended or continued. Without exception, the motion is deemed denied by operation of law if the trial court has failed to rule within 75 days after sentencing. *Id.* R. 21.8(a), (c). The Texas Court of Criminal Appeals has recognized that these time constraints make it “virtually impossible for appellate counsel to adequately present an ineffective assistance claim to the trial court.” *Robinson*, 16 S.W.3d at 811. To begin with, the “trial record [i]s generally not ... transcribed” before the 30-day deadline expires. *Torres*, 943 S.W.2d at 475. Under the Texas Rules of Appellate Procedure, the deadline to prepare a transcript is at least 60 days from sentencing, and even longer when a motion for new trial is filed. Tex. R. App. P. 35.2. That deadline may also be extended. *See id.* R. 35.3.

Further, the Texas Rules of Professional Conduct preclude trial counsel from raising an ineffective-assistance claim against himself where he would be required to be called as a witness. Tex. Disc. R. Prof’l

Conduct 1.15(a)(1). And, as explained, calling trial counsel as a witness is necessary in all but the most patently egregious cases of ineffectiveness. See *Torres*, 943 S.W.2d at 475 (“[M]ounting an ineffective assistance attack in a motion for new trial is inherently unlikely if trial counsel remains counsel during the time required to file such a motion.”); *Robinson*, 16 S.W.3d at 811 (“[I]t would be absurd to require trial counsel to litigate his own ineffectiveness in a motion for new trial[.]”). No rule, however, requires appellate counsel to be appointed before the 30-day deadline for a new-trial motion expires. Texas procedures thus make it literally impossible for a defendant to raise an ineffective-assistance-of-trial-counsel claim on direct appeal in the many cases in which the trial transcript is not completed or new appellate counsel is not appointed in time to meet the 30-day deadline.<sup>20</sup>

Even when moving for a new trial is technically possible, it nonetheless usually remains infeasible. Developing a sufficient record in a motion for new trial “in most cases ... will be impractical because the time constraints for filing a motion for new trial do not provide for adequate investigation.” *Jackson*, 877 S.W.2d at 772 & n.3 (Baird, J., concurring) (internal citation omitted); see also *Varelas*, 45 S.W.3d at 629-630 (“In most cases, the record on direct appeal is ‘inadequate to develop an ineffective assistance claim’ because ‘the very ineffectiveness claimed may prevent the record from containing the information necessary to substantiate such a claim.’”); cf. *Martinez*, 132 S. Ct. at 1318

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<sup>20</sup> In this case, the trial court appointed appellate counsel for Trevino eight days after sentencing. The transcript of the penalty phase of Trevino’s trial, however, was not prepared until more than seven months after sentencing. JA292.



("[a]bbreviated deadlines" may not allow adequate time to investigate and develop ineffective-assistance claims). Even where trial counsel's error is apparent on the face of the trial record, Texas courts in almost all cases require the record to be supplemented with trial counsel's testimony as to the strategic reason for his decisions at trial. *See supra* pp. 25-26 & n.12; 42 *Texas Practice* § 29:76. With *Wiggins* and similar claims, the error and its prejudicial effect are *never* apparent from the trial record: they *always* require extensive extra-record investigation, which almost by definition cannot be performed within the 30-day deadline for filing a motion for new trial. Discovering and substantiating a claim that trial counsel was ineffective for failing to investigate, develop, and present mitigating evidence requires a defendant to conduct not only his own comprehensive mitigation investigation, but also a complete review of trial counsel's files and work product. It is precisely for claims like these that the Texas legislature and highest criminal court have designated habeas review as the appropriate mechanism for a defendant sentenced to death to investigate and litigate the claim.<sup>21</sup>

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<sup>21</sup> In support of its view that the motion for new trial is a viable means for Texas defendants to challenge trial counsel's ineffectiveness, the *Ibarra* court cited *Holden v. State*, 201 S.W.3d 761 (Tex. Crim. App. 2006). *See* 687 F.3d at 227. *Holden*, however, was not a death-penalty case, and thus was not governed by the dual-track division of responsibilities between appellate and habeas counsel. *See supra* pp. 7-8, 29-34. Moreover, the defendant's claim—that her trial counsel rendered ineffective assistance by failing to advise her that lack of intent was a defense to the charged offense—required virtually no additional record development. *Holden*, 201 S.W.3d at 762. Because the defendant had pleaded no contest, there was no trial record to prepare; the rele-

**2. The existence of rare exceptions should not produce a different result**

Given the limited utility of the motion for new trial—as well as Texas’s systematic channeling of ineffective-assistance claims to collateral review in death-penalty cases—it is only in rare and exceptional cases that a capital defendant can develop and litigate potentially meritorious ineffective-assistance-of-trial-counsel claims in the context of direct review. The existence of those rare exceptions does not support the court of appeals’ refusal to apply *Martinez* to Texas cases.

As an initial matter, Trevino’s claim in this case clearly could not have been raised on a motion for new trial. The transcript of the penalty phase of Trevino’s sentence did not become available until seven months after sentencing. JA292. And development of Trevino’s *Wiggins* claim required extensive investigation by federal habeas counsel.

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vant evidence was available in simple affidavits of the defendant and trial counsel. *Id.*

The only case we are aware of in which the Texas Court of Criminal Appeals has adjudicated a *Wiggins*-style claim in a death-penalty case on direct review following a motion for new trial is *Armstrong v. State*, 2010 WL 359020 (Tex. Crim. App. Jan. 27, 2010). *Armstrong* is the classic exception that proves the rule. Although *Armstrong* attempted to develop his ineffective-assistance claim through a motion for new trial, the resulting record was nonetheless inadequate. *Id.* at \*5-7. The Court of Criminal Appeals refused to “speculate” about the existence of mitigation evidence that *Armstrong* had not yet developed. *Id.* at \*7. *Armstrong*’s state habeas counsel developed further mitigation evidence and brought his ineffective-assistance claim based on that expanded record in habeas proceedings. *See* Appl. for Postconviction Writ of Habeas Corpus, *Ex Parte Armstrong*, No. CR-2095-06-G(1) (Hidalgo County (Tex.) Dist. Ct. Feb. 19, 2009) (decision pending).

More fundamentally, the court of appeals in *Ibarra* erred by determining the applicability of *Martinez* in all Texas cases based on what occurs only in exceptional cases. Procedural rules must govern in all cases. This Court therefore generally looks to the ordinary case, not the extraordinary, in determining the content of those rules. See, e.g., *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 608 (2009) (“That a fraction of orders adverse to the attorney-client privilege may nevertheless harm individual litigants in ways that are ‘only imperfectly reparable’ does not justify making *all* such orders immediately appealable as of right under § 1291.” (emphasis added)). In *Martinez* itself, the Court looked to how initial-review collateral proceedings “likely” or “often” operate. 132 S. Ct. at 1316, 1317. The Court should take the same approach in deciding whether *Martinez* applies in Texas cases.

That is particularly so because the rationale of *Martinez* applies equally notwithstanding the exceptions on which *Ibarra* relied. In reality, additional development of the record will virtually always be required to support ineffective-assistance-of-trial-counsel claims in death-penalty cases. See *supra* pp. 25-27 & n.12. That is certainly true as to *Wiggins* claims. Even as to claims requiring less extensive record development, the record on direct review is inadequate in the vast majority of cases. That is indeed why Texas courts instruct defendants not to raise such claims on direct review and the Texas legislature adopted the dual-track system channeling ineffective-assistance claims in death-penalty cases to habeas corpus proceedings. See *supra* pp. 24-33. This Court’s procedural-default rules should reinforce, rather than undermine, Texas’s “deliberate[] cho[ice],” regardless whether

there are rare cases that do not exhibit the qualities that led Texas to make that choice.

A different analysis might apply in jurisdictions that do not systematically channel trial-ineffectiveness claims to initial-review collateral proceedings. Some States, for example, require in all but a few circumstances that claims of ineffective assistance of trial counsel be presented on direct review or else they are waived. *See, e.g., Sporn v. State*, 139 P.3d 953, 953-954 (Okla. Crim. App. 2006); *Becoats v. State*, 733 S.E.2d 795, 796-797 (Ga. App. 2012). Other jurisdictions provide a robust mechanism for expanding the record to permit adjudication of ineffective-assistance claims in the context of direct review. *See, e.g., State v. Davis*, 85 P.3d 1164, 1167, 1169 (Kan. 2004) (concluding, on direct appeal, that defendant had received ineffective assistance of counsel based on evidentiary hearing held pursuant to *State v. Van Cleave*, 716 P.2d 580 (Kan. 1986)); *People v. Grant*, 684 N.W.2d 686, 690, 698 (Mich. 2004) (concluding, on direct appeal, that defendant had received ineffective assistance of counsel based on evidentiary hearing held pursuant to *People v. Ginther*, 212 N.W.2d 922, 926 (Mich. 1973)). Whether or not the impracticality alone of relying on direct appeal for claims that “do not manifest themselves until the appellate process is complete” would warrant extension of *Martinez* in those jurisdictions, *cf. Martinez*, 132 S. Ct. at 1321 n.1 (Scalia, J., dissenting), the Court need not go that far to decide this case. Texas has made a procedural choice like Arizona’s that, for the same reasons, warrants application of the equitable rule the Court recognized in *Martinez*.



## II. TREVINO CAN ESTABLISH CAUSE TO EXCUSE PROCEDURAL DEFAULT UNDER *MARTINEZ* BECAUSE HIS *WIGGINS* CLAIM IS "SUBSTANTIAL"

Under *Martinez*, a federal habeas petitioner can establish cause to excuse a procedural default when counsel in an initial-review collateral proceeding was ineffective under the standard of *Strickland*, 466 U.S. at 686. See *Martinez*, 132 S. Ct. at 1318. That is, habeas counsel's performance must have fallen "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. And there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "To overcome the default" caused by counsel's ineffectiveness in the initial-review collateral proceeding, "a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that ... the claim has some merit." *Martinez*, 132 S. Ct. at 1318-1319 (citing *Miller-El*, 537 U.S. 322 (describing standards for certificates of appealability)). As this Court's citation to *Miller-El* makes clear, the merit of the ineffective-assistance-of-trial-counsel claim must be "debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.

Here, as in *Martinez*, the court of appeals "did not determine whether [Trevino's] attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of trial counsel is substantial. And the court did not address the question of prejudice." 132 S. Ct. at 1321; see JA134-164. Accordingly, as in *Martinez*, a remand for consideration of the merits of Trevino's ineffective-assistance-of-trial-counsel claim is the appropriate remedy. Trevino has a "substantial" ineffective-assistance claim that should have been

raised in his first state habeas petition. *Martinez* requires that he be permitted to pursue that claim below.

1. Certainly, Trevino's trial counsel's complete failure to investigate, develop, or present mitigating evidence at the penalty phase of his trial constituted deficient performance. In *Wiggins v. Smith*, 539 U.S. 510, 523-524 (2003), this Court made clear that the failure to investigate such evidence for use at capital sentencing—particularly where counsel has reason to know such evidence might exist—falls well below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 691 (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”); *Williams v. Taylor*, 529 U.S. 362, 390-391 (2000) (duty to conduct reasonable mitigation investigation clearly established under *Strickland*). Here, trial counsel undertook no such investigation. Instead, he offered the testimony of a single witness in the penalty phase—Trevino's aunt, who testified generally that Trevino had a troubled upbringing. *See supra* pp. 6 & 10 n.6. That general testimony, however, would have alerted a reasonable attorney that additional mitigating evidence might be available and that further investigation was warranted. *See Wiggins*, 539 U.S. at 527 (“[A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.”).

For the same reasons, Trevino's state habeas counsel's failure to investigate or raise a *Wiggins* claim during initial-review collateral proceedings was ineffective assistance of counsel. His failure to conduct an independent investigation violated Texas law and professional norms. *See Tex. Code Crim. Proc. art. 11.071*



§ 3(a); *see also* SBOT Guidelines, 69 Tex. Bar J. at 976-979. Moreover, there is reason to believe that habeas counsel's failure to investigate did not reflect any legitimate strategic judgment, but instead resulted from the worsening physical and psychological health problems that led his doctor to "strongly urge" him to discontinue representing death penalty defendants. JA515; *see supra* p. 11.

2. Trevino has a "substantial claim" that his counsel's failure to conduct a reasonable mitigation investigation resulted in actual prejudice. Once federal habeas counsel undertook such an investigation, he uncovered what the district court called a "wealth of" significant mitigating evidence related to Trevino's abusive upbringing and fetal alcohol syndrome and the lasting psychological effects of that traumatic childhood. JA131-132; *see supra* pp. 11-12. That evidence bears directly on Trevino's moral culpability. Texas law provided a vehicle through which the jurors at Trevino's trial could have given full effect to such evidence, even if they felt compelled to answer the other special-issue questions in the affirmative. *See* Tex. Code Crim. Proc. art. 37.071(2)(e) (1996) (requiring capital sentencing juries to consider "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed"). But Trevino's jury never had the opportunity to consider such evidence. Had the jury been able to do so, there is a reasonable probability that at least one of the jurors would have decided that Trevino should be sentenced to life in prison rather than death. *See*

*Strickland*, 466 U.S. at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”). The evidence “might well have influenced the jury’s appraisal of [Trevino’s] moral culpability.” *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. at 398); see also *Wiggins*, 539 U.S. at 538. At a minimum, Trevino’s claim has “some merit” under these standards. *Martinez*, 132 S. Ct. at 1318.

The district court primarily rested its rejection of Trevino’s ineffective-assistance claim on procedural default. In the alternative, it also held that “[t]here is simply no reasonable probability” that the outcome of the penalty phase would have been different. JA78. But the district court’s own grant of a certificate of appealability on the “actual innocence” question—acknowledging that “reasonable minds could disagree” as to whether trial counsel’s failure to conduct a mitigation investigation worked a “fundamental miscarriage of justice”—establishes *a fortiori* that Trevino’s showing of prejudice is “substantial.” JA131-132; see *Martinez*, 132 S. Ct. at 1318-1319 (citing *Miller-El* standard for granting certificate of appealability as standard for “substantiality”). The court granted that certificate of appealability based on its conclusion that “even the most minimal investigation into [Trevino’s] background ... would have revealed a wealth of additional mitigating evidence far more substantial tha[n] the superficial account of petitioner’s childhood given by petitioner’s lone witness during the punishment phase of trial.” JA131-132. The court of appeals similarly acknowledged that “the volume of new evidence identified by Trevino is much greater than what was presented by his trial attorneys.” JA162.

Substantiality aside, the district court's alternative holding as to the ultimate question of *Strickland* prejudice was also premature. In assessing prejudice caused by counsel's failure to conduct a mitigation investigation, *Wiggins* requires the court to "reweigh the evidence in aggravation against the *totality* of available mitigating evidence." 539 U.S. at 534 (emphasis added). But Trevino has not received the benefit of an evidentiary hearing on these issues. See 28 U.S.C. § 2254(e) (standard for evidentiary hearing); *Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000) (under § 2254, "if the district court determines that [petitioner] has established cause and prejudice for his procedural default, it should proceed to conduct an evidentiary hearing on any claim for which cause and prejudice exists" (citing *Williams v. Taylor*, 529 U.S. 420, 443 (2000))). An evidentiary hearing is especially appropriate in a case like this one, where the district court perceived the mitigating evidence to have a "double-edged" effect. JA76. Without exploring the full mitigating impact of that evidence, the district court could not have properly reweighed the "totality" of that evidence against the aggravating evidence, as *Wiggins* requires.

The failure of Trevino's state habeas counsel to investigate, develop, or present any mitigation evidence in the initial-review collateral proceeding thus denied Trevino the opportunity to present a substantial claim of ineffective assistance of trial counsel and prevented any court from giving "proper consideration" to that substantial claim. *Martinez*, 132 S. Ct. at 1318. The Court should remand to permit Trevino to pursue this claim under the standards set forth in *Martinez*.

**CONCLUSION**

The judgment of the court of appeals should be reversed, and the case should be remanded for consideration of Trevino's *Wiggins* claim under *Martinez*.

Respectfully submitted.

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DECEMBER 2012

## **APPENDIX**

## **STATUTORY PROVISIONS**

**Tex. Code Crim. Proc. art. 11.071. Procedure in death penalty case**

### **Application to Death Penalty Case**

**Sec. 1.** Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

### **Representation by Counsel**

**Sec. 2. (a)** An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

**(b)** If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital writs to represent the defendant as provided by Subsection (c).

**(c)** At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital writs or, if the office of capital writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel under Subsection (f), unless the applicant elects to pro-



ceed pro se or is represented by retained counsel. On appointing counsel under this section, the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

\* \* \*

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599. The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code. The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital writs, regardless of whether the attorney is appointed by the convicting court or was ap-

pointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code.

### **State Reimbursement; County Obligation**

**Sec. 2A.** (a) The state shall reimburse a county for compensation of counsel under Section 2, other than for compensation of counsel employed by the office of capital writs, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office of capital writs. The total amount of reimbursement to which a county is entitled under this section for an application under this article may not exceed \$25,000. Compensation and expenses in excess of the \$25,000 reimbursement provided by the state are the obligation of the county.

\* \* \*

### **Investigation of Grounds for Application**

**Sec. 3.** (a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

(b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

(1) the claims of the application to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the convicting court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the convicting court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement by the convicting court.

(e) Materials submitted to the court under this section are a part of the court's record.

(f) This section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office of capital writs.

## **Filing of Application**

**Sec. 4. (a)** An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

(b) The convicting court, before the filing date that is applicable to the applicant under Subsection (a), may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date applicable to the defendant under Subsection (a). Either party may request that the court hold a hearing on the request. If the convicting court finds that the applicant cannot establish good cause justifying the requested extension, the court shall make a finding stating that fact and deny the request for the extension.

(c) An application filed after the filing date that is applicable to the applicant under Subsection (a) or (b) is untimely.

(d) If the convicting court receives an untimely application or determines that after the filing date that is applicable to the applicant under Subsection (a) or (b) no application has been filed, the convicting court immediately, but in any event within 10 days, shall send to the court of criminal appeals and to the attorney representing the state:

(1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting

court that no application has been filed within the time periods required by Subsections (a) and (b); and

(2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

(e) A failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b) constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A.

\* \* \*

#### **Tex. Code Crim. Proc. art. 26.05. Compensation of Counsel Appointed to Defend**

(a) A counsel, other than an attorney with a public defender's office or an attorney employed by the office of capital writs, appointed to represent a defendant in a criminal proceeding, including a habeas corpus hearing, shall be paid a reasonable attorney's fee for performing the following services, based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel:

(1) time spent in court making an appearance on behalf of the defendant as evidenced by a docket entry, time spent in trial, and time spent in a proceeding in which sworn oral testimony is elicited;

(2) reasonable and necessary time spent out of court on the case, supported by any documentation that the court requires;



(3) preparation of an appellate brief and preparation and presentation of oral argument to a court of appeals or the Court of Criminal Appeals; and

(4) preparation of a motion for rehearing.

**Tex. Code Crim. Proc. art. 26.052. Appointment of counsel in death penalty case; reimbursement of investigative expenses**

(a) Notwithstanding any other provision of this chapter, this article establishes procedures in death penalty cases for appointment and payment of counsel to represent indigent defendants at trial and on direct appeal and to apply for writ of certiorari in the United States Supreme Court.

(b) If a county is served by a public defender's office, trial counsel and counsel for direct appeal or to apply for a writ of certiorari may be appointed as provided by the guidelines established by the public defender's office. In all other cases in which the death penalty is sought, counsel shall be appointed as provided by this article.

\* \* \*

(e) The presiding judge of the district court in which a capital felony case is filed shall appoint two attorneys, at least one of whom must be qualified under this chapter, to represent an indigent defendant as soon as practicable after charges are filed, unless the state gives notice in writing that the state will not seek the death penalty.

(f) Appointed counsel may file with the trial court a pretrial ex parte confidential request for advance



payment of expenses to investigate potential defenses. The request for expenses must state:

- (1) the type of investigation to be conducted;
- (2) specific facts that suggest the investigation will result in admissible evidence; and
- (3) an itemized list of anticipated expenses for each investigation.

(g) The court shall grant the request for advance payment of expenses in whole or in part if the request is reasonable. If the court denies in whole or in part the request for expenses, the court shall:

- (1) state the reasons for the denial in writing;
- (2) attach the denial to the confidential request; and
- (3) submit the request and denial as a sealed exhibit to the record.

(h) Counsel may incur expenses without prior approval of the court. On presentation of a claim for reimbursement, the court shall order reimbursement of counsel for the expenses, if the expenses are reasonably necessary and reasonably incurred.

(i) If the indigent defendant is convicted of a capital felony and sentenced to death, the defendant is entitled to be represented by competent counsel on appeal and to apply for a writ of certiorari to the United States Supreme Court.

(j) As soon as practicable after a death sentence is imposed in a capital felony case, the presiding judge of the convicting court shall appoint counsel to represent an indigent defendant on appeal and to apply for a writ of certiorari, if appropriate.

(k) The court may not appoint an attorney as counsel on appeal if the attorney represented the defendant at trial, unless:

(1) the defendant and the attorney request the appointment on the record; and

(2) the court finds good cause to make the appointment.

(l) An attorney appointed under this article to represent a defendant at trial or on direct appeal is compensated as provided by Article 26.05 from county funds. Advance payment of expenses anticipated or reimbursement of expenses incurred for purposes of investigation or expert testimony may be paid directly to a private investigator licensed under Chapter 1702, Occupations Code, or to an expert witness in the manner designated by appointed counsel and approved by the court.

\* \* \*

# **RESPONDENT'S BRIEF**

**In the Supreme Court of the United States**

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CARLOS TREVINO, PETITIONER

v.

RICK THALER, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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**BRIEF FOR THE RESPONDENT**

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## QUESTION PRESENTED

Every person who is sentenced to death in Texas receives (1) a new, conflict-free appellate lawyer; (2) funding for appellate counsel's development of extra-record claims through investigators and experts; (3) an opportunity to challenge his trial counsel's effectiveness in a motion for new trial; and (4) an automatic direct appeal of his claims, including any ineffective-assistance-of-trial-counsel claims, to the Texas Court of Criminal Appeals. Texas extended those rights to ensure that everyone facing the State's ultimate criminal sanction could raise their ineffectiveness claims on direct appeal, without waiting until state-habeas proceedings. The State and its political subdivisions spend millions of dollars every year to provide those additional rights to defendants convicted of capital murder.

Notwithstanding the procedures and resources provided by the State, Carlos Trevino failed to raise his ineffectiveness claim in state court until a successive, procedurally barred habeas application. The question presented is:

Whether a prisoner sentenced to death in Texas can establish cause to excuse a procedural default under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), after failing to use a new, conflict-free attorney provided by the State, state funding for investigators and experts, a new-trial mechanism, a direct appeal, and a state-habeas proceeding to raise an ineffective-assistance-of-trial-counsel claim.

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# **In the Supreme Court of the United States**

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No. 11-10189

CARLOS TREVINO, PETITIONER

v.

RICK THALER, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION

---

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

---

## **BRIEF FOR THE RESPONDENT**

---

### **INTRODUCTION**

In Texas, new-trial motions and direct appeals provide the first opportunity to raise ineffective-assistance-of-trial-counsel claims. And the State has made that opportunity a meaningful one by appointing and paying for new, conflict-free counsel, investigators, and experts whenever a death sentence is imposed. By empowering capital-murder convicts to raise their ineffectiveness claims while memories are still fresh and records are not yet stale — and while the protections of the Sixth Amendment still apply — reformers in Texas created a “model in the [N]ation.” Debate on Tex. S.B. 440 on the Floor of the House, 74th Leg., R.S. (May 18, 1995) (Rep. Gallego).

Using the procedures and resources that Texas affords for new-trial motions and direct appeals,

prisoners have brought and won ineffectiveness claims. Those victories include ineffectiveness claims premised on trial lawyers' failures to investigate and introduce mitigating evidence at sentencing. Because Texas affords a meaningful opportunity for prisoners to vindicate their ineffectiveness claims on direct appeal, the State's system creates none of the equitable concerns identified in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

If this Court nonetheless extends *Martinez* to Texas, its holding would be far from "narrow" or "equitable," *Martinez*, 132 S. Ct. at 1315, 1318, or "respect[ful]" of state law, Pet'r Br. 35. Such a holding would undermine the procedural-default doctrine in States across the country. It would allow prisoners to circumvent the relitigation bar codified by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. 2254(d), in countless cases. And it would inundate state and federal courts with long-ago defaulted claims.

That is an enormous amount of collateral damage, and it should not be imposed without considering all of the interests involved. For more than two generations, the State and families victimized by violent crime have relied on the promise of finality inherent in the procedural-default doctrine. And existing exceptions to that doctrine already protect the wrongly accused and defendants who receive constitutionally ineffective appellate counsel. This Court should not expand those exceptions to allow further review of a meritless claim by a man who raped and murdered a fifteen-year-old girl.

## STATEMENT

### A. Legal Background

1. This Court long has held that federal courts should not grant habeas relief until state prisoners properly exhaust their state-law remedies. See, e.g., *Ex parte Royall*, 117 U.S. 241, 252-253 (1886); 28 U.S.C. 2254(b)-(c). As a corollary, where a prisoner fails to follow the State's procedures in exhausting a claim, and where the state court rejects the prisoner's claim on account of that procedural violation, the procedural-default doctrine insulates the state-court judgment from second-guessing by federal courts. *Lambrix v. Singletary*, 520 U.S. 518, 522-523 (1997); cf. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635-636 (1875).

The legitimacy of extending federal habeas to state prisoners depends on the strength of the procedural-default doctrine. As this Court has recognized, it is difficult to reconcile the federal power to invalidate already-final state-court judgments with the concept of coequal sovereignty, principles of comity and federalism, and the imperative of finality in criminal law. See, e.g., *Harrington v. Richter*, 131 S. Ct. 770, 786-787 (2011); *Coleman v. Thompson*, 501 U.S. 722, 730-731 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 87-90 (1977).

That tension is exacerbated when a federal court adjudicates a claim that the state court has held to be barred by a violation of the State's procedural rules. State courts must have a fair opportunity to correct errors in their own proceedings and must be allowed to develop factual records of those errors while the memories of the trial judge, counsel, and

witnesses "are freshest." *Sykes*, 433 U.S. at 88; see also *Coleman*, 501 U.S. at 750-751; *Engle v. Isaac*, 456 U.S. 107, 127-129 (1982). When state prisoners deny the State those opportunities by disregarding the State's procedures, avoiding merits adjudications in state court, and then litigating instead in federal court years after the original trial, the tension inherent in federal-habeas review becomes unbearable. See *Sykes*, 433 U.S. at 89-90 (litigating defaulted claims in federal court encourages "'sandbagging' on the part of defense lawyers" and "tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event"); *Murray v. Carrier*, 477 U.S. 478, 490-491 (1986).

2. While the State's interests (and the need for federal deference to them) are compelling, a prisoner can overcome a procedural default in two narrow circumstances. First, a federal court can excuse a procedural default by a state prisoner who "probably" is "actually innocent." *Carrier*, 477 U.S. at 496. Second, a state prisoner can overcome a procedural default by proving that "some objective factor external to the defense" caused it and "actual and substantial" prejudice resulted from it. *Id.* at 488, 494; see also *Sykes*, 433 U.S. at 90-91.

Until last Term, the alleged ineffectiveness of state-habeas counsel could not constitute cause to excuse a procedural default. See *Coleman*, 501 U.S. at 755-757. Last Term's *Martinez* decision, however, announced a "narrow" "modif[ication]" of that settled rule. 132 S. Ct. at 1315. Exercising its equitable discretion, the Court held that state prisoners should have one opportunity to raise an ineffective-

assistance-of-trial-counsel claim with the assistance of a second (and this time effective) lawyer. See *id.* at 1317. In many States, that holding does not “modify” *Coleman* at all because prisoners can challenge the effectiveness of their trial lawyers on direct appeal, where the constitutional right to counsel still attaches. *Id.* at 1315; see *Evitts v. Lucey*, 469 U.S. 387 (1985). If a prisoner in one of those States forgoes an ineffectiveness claim on direct appeal, his only avenue for overcoming a subsequent default is to challenge the efficacy of his direct-appeal lawyer. See *Carrier*, 477 U.S. at 497; *Martinez*, 132 S. Ct. at 1319-1320 (reaffirming *Carrier*).

Arizona, however, imposed a bright-line ban on litigation of ineffective-assistance-of-trial-counsel claims on direct appeal. See *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002). By doing so, Arizona forced its prisoners to raise ineffectiveness claims in state habeas — where they have no constitutional right to counsel and hence, under *Coleman*, no recourse when their state-habeas lawyers default substantial claims. To alleviate that potential inequity, this Court held that a State cannot force its prisoners to raise ineffectiveness claims in a forum where they lack the right to an adequate attorney, and then turn around and invoke the procedural-default doctrine to insulate the results of that uncounseled proceeding. See *Martinez*, 132 S. Ct. at 1319-1320.

3. Texas made none of the choices that Arizona made. To the contrary, Texas “deliberately chose” to empower death-row prisoners to raise ineffectiveness claims *either* on direct appeal *or* in state habeas. *Martinez*, 132 S. Ct. at 1318. The Legislature made



that choice because it wanted to provide death-sentenced prisoners with an additional (and constitutionally protected) layer of review for their ineffectiveness claims.

The Legislature recognized that the first prerequisite to challenging trial counsel's effectiveness is appointment of a new, conflict-free lawyer. If the same lawyer is responsible both for the ineffectiveness and for condemning her own misconduct, "it's very difficult to raise that issue and say you're an ineffective attorney and therefore your client received the death penalty." Hearings on Tex. H.B. 1562 at 1, Before House Comm. on Criminal Jurisprudence, 73d Leg., R.S. (May 10, 1993) ("H.B. 1562 Hr'g Tr."). Accordingly, with support from the State Bar of Texas and capital-punishment lawyers from the University of Texas, the Legislature agreed to provide every death-sentenced prisoner with a new appellate lawyer who had no prior involvement in the case and therefore could raise ineffectiveness claims on direct appeal. See Habeas Corpus Reform Act, 74th Leg., R.S., ch. 319, § 2, Tex. Gen. Laws 2764, 2764-2765 (1995) ("1995 Reform Act") (creating Tex. Code Crim. Proc. art. 26.052); House Comm. on Criminal Jurisprudence, Interim Report to the 74th Texas Legislature 63-64 (Nov. 1994) ("Interim Report") (noting support from State Bar and U.T. capital-punishment clinic for new, conflict-free direct-appeal lawyers).

Moreover, where ineffectiveness claims hinge on evidence not presented at trial, the new-trial mechanism allows counsel to develop the record and preserve the claims for direct appeal. As the leading treatise on Texas practice observes, "ineffective

assistance of counsel [is] a frequent issue raised in new trial motions.” 43A George E. Dix & John M. Schmolesky, *Texas Practice Series* § 50:15, at 639 (3d ed. 2011) [hereinafter *Texas Practice*]. Direct-appeal counsel are entitled to reimbursement of funds spent on investigators and experts used to develop their ineffectiveness claims. See Tex. Code Crim. Proc. art. 26.052(l). Numerous prisoners have raised and won such claims prior to their state-habeas proceedings. See, e.g., *State v. Jones*, 2004 WL 231309, at \*8 (Tex. Crim. App. Jan. 28, 2004) (collecting cases). It is therefore indisputable that state habeas “is not the only mechanism for developing an ineffectiveness claim. An increasing number of cases \* \* \* use the motion for new trial as a vehicle for developing the necessary record.” *Ibid*.

### **B. Factual Background**

In 1996, Carlos Trevino and three of his friends (Santos Cervantes, Brian Apolinar, and Seanido Rey) brutally gang-raped and murdered a fifteen-year-old girl in Bexar County, Texas. The details of the crime are relevant both because Trevino falsely implies that he was a mere bystander to a capital crime committed by others, and because the heinousness of Trevino’s actions demonstrates the reasonableness of his lawyers’ strategies.

1. On May 9, 1996, Trevino was released from prison on parole. JA377. He had just finished a two-year sentence for unlawful possession of a semiautomatic pistol. 23RR71-73. Trevino served his entire prison sentence in solitary confinement because he is a member of a deadly prison gang called *Hermanos de Pistoleros Latinos* (or “Brotherhood of Latino Gunmen”). 23RR92-100.

On June 9, 1996, one month after Trevino left prison, he was partying with his friends. When they ran out of beer, Trevino and the others went to buy more. Upon arriving at the convenience store, one of Trevino's friends saw a young girl named Linda Salinas wearing a Bugs Bunny T-shirt and talking on a payphone. JA265. Salinas was on her way to a sleepover at a friend's house. One of the men promised to drive the girl to meet her friend. Instead, Trevino and his friends drove Salinas to a park; gang-raped her vaginally, anally, and orally; severed her carotid artery by stabbing her in the neck; and left her to bleed to death in a creekside ditch.

Forensic evidence from the crime scene linked one and only one man to the crime: Carlos Trevino. Police found Trevino's blood in Salinas's underwear. JA271. They found fibers from Trevino's pants in Salinas's underwear. JA230. And they found fibers from Trevino's pants in Salinas's shorts. JA230-231. The horrific injuries inflicted by the grown men on their 100-pound victim confirmed that Salinas was gang-raped. JA265-270. But the police's rape kits, DNA tests, serology tests, and fiber analyses either eliminated or failed to inculcate everyone except Trevino. Cf. Pet'r Br. 3 (reporting in the passive voice that Salinas "was brutally raped"); *id.* at 4 (blaming three others for the rape); *ibid.* (referring to Trevino's "alleged role[]").

And that's not all. Trevino's cousin, Juan Gonzales, served as a lookout during the crime and told police about Trevino's involvement. According to Gonzales, Trevino pinned Salinas down while his friend anally raped her. JA263. One of Trevino's

friends then said, "We don't need no witnesses." JA258. Trevino replied, "We'll do what we have to do." *Ibid.* After one of Trevino's accomplices remarked that Trevino's murderous actions were "neat," Trevino replied that he "learned how to kill in prison." JA282. Trevino also bragged that "I learned how to use a knife in prison." *Ibid.* And Trevino was covered in blood when he came back to the car. JA260. The record reveals nothing to suggest (and Trevino never has argued) that Gonzales had an ulterior motive to inculcate his own cousin in a capital murder.

After Trevino murdered Salinas, he and his accomplices returned to the party. While the others drank and did drugs, Trevino and a friend went outside and destroyed evidence of the crime. In particular, they burned the backpack Salinas had been wearing when the men picked her up at the convenience store. 16RR159-177.

2. In July 1996, Trevino was indicted for capital murder, and the court appointed Mario Trevino ("Mario," no relation to petitioner) as lead defense counsel. JA370. Mario was a former counsel to the Financial Services Committee of the U.S. House of Representatives and a former prosecutor in the Bexar County District Attorney's Office. JA367. At the time of his appointment, he had seventeen years of criminal-defense work under his belt, and he had served as defense counsel in several capital-murder trials. JA367-368. The court also appointed Gus Wilcox to second-chair the trial; at the time, Wilcox had twenty-five years of criminal-defense experience, in addition to "many years" of experience in the Bexar County District Attorney's Office. JA370-371.



Based on their experience with capital cases, Mario and Wilcox thought a plea bargain offered the best chance to avoid a death sentence. JA372. Defense counsel secured a plea offer from the district attorney, which Trevino accepted. JA378. Mario and Trevino went to the district attorney's office to sign a statement confessing Trevino's role in the rape and murder. JA379-380. But Trevino changed his mind after other members of the Pistoleros gang told him not to cooperate with authorities. JA516-517.

### **C. Procedural Background**

1. After Trevino rejected the State's plea offer, Mario and Wilcox turned their attention to the trial. In August 1996 — almost a year before trial began — Mario moved for appointment of a private investigator "to [e]nsure that defendant receive[s] his rights to effective assistance of counsel." JA194. The trial court granted the motion and appointed Edward Villanueva to work on Trevino's behalf.

Mario, Wilcox, and Villanueva hoped to convince the jury that Trevino "was merely present and did nothing to commit the crime." JA389. When the trial began, the State had no forensic proof to the contrary. The State's principal evidence linking Trevino to the crime was eyewitness testimony from Trevino's cousin, Gonzales. Accordingly, the defense focused its guilt-phase efforts on excluding or impeaching Gonzales's testimony. See JA302-303, 363-364, 376-377, 389-390. Impeaching Gonzales's testimony was a tall task because every witness to the crime agreed that Trevino participated in it, see JA390, and because Mario could not call Trevino to deny the State's allegations without suborning perjury, see JA384.

The trial's landscape shifted during voir dire. Before jury selection began, the State informed Mario that it intended to test a bloodstain in Salinas's underwear. JA224. Mario then conferred with his client:

So I went back to Mr. Trevino, my client, and said, what do you want me to do? I can go up and ask for a continuance right now. We can do it, or we could roll the dice and let it go. But more importantly, before we do all that, is there any chance, and I mean any chance, that it might come back to you, and he said no.

JA399. On the basis of his client's assurances — and with confidence that the State's additional testing would either exonerate or fail to inculcate Trevino — Mario made a strategic decision not to seek a continuance or conduct his own DNA analysis. *Ibid.*

The test results, however, implicated Trevino and Trevino alone. The lab returned its results near the end of voir dire, and the State immediately shared them with Mario. In response, Mario and Wilcox moved for a mistrial. JA225-226. Then they moved for a continuance. JA310. The trial court denied both motions but granted defense counsel's request for appointment and payment of a DNA expert, GeneScreen Forensic Serology Testing. JA226-229. And the court granted counsel's extraordinary, midtrial request for a continuance to allow a GeneScreen expert to testify. 19RR136. But after the defense conducted its own testing, which presumably confirmed Trevino's guilt, Mario decided not to call GeneScreen to testify.



The jury found compelling the DNA evidence of Trevino's blood in Salinas's underwear. See JA350 (juror interviews); cf. Pet'r Br. 4 (suggesting Trevino's conviction rested exclusively on Gonzales's eyewitness testimony). The jury found Trevino guilty of capital murder.

2. Months before trial, defense counsel began a thorough mitigation investigation. As Mario later testified, the goal of that investigation was to convince the jury "to find that there was a mitigating circumstance that would suggest that the death penalty is not appropriate." JA391-392. Although Trevino refused to provide leads for potentially helpful family members, JA392, the defense team repeatedly interviewed Trevino's aunt, see JA200, 303, and stepfather, JA303, 382, 392. They diligently tried to reach Trevino's mother, but she was an alcoholic and hence unavailable to testify. JA285, 391-392. They also investigated Trevino's educational background, JA277-278, 286, 392-393, and propounded over seventy mitigation-related discovery requests, JA200-222. Cf. Pet'r Br. 6 ("Defense counsel conducted no mitigation investigation \* \* \*").

After conducting its investigation, the defense decided to present one witness (Trevino's aunt, Juanita DeLeon) at sentencing. DeLeon portrayed Trevino as a hard-working and loving man who grew up on welfare with an alcoholic mother and absent father, but who nonetheless made the best of his difficult circumstances. JA285-289. And DeLeon made an impassioned plea for mercy on Trevino's behalf. JA290. The jury rejected those arguments,

however, and Trevino was sentenced to death on July 3, 1997.

3. After sentencing, defense counsel advised Trevino to accept new, conflict-free appellate counsel, as was Trevino's right under Texas Code of Criminal Procedure article 26.052. JA401-402. Mario did so to allow Trevino to raise an ineffectiveness claim on direct appeal. As Mario explained, "I think it's best to have someone come in from the outside and look at everything." JA402. Trevino accepted that strategy.

Four days after imposition of Trevino's sentence, on July 7, 1997, the trial court appointed Richard Langlois as direct-appeal counsel. JA298-299. Langlois was a prominent criminal-defense attorney with no prior involvement in the case, and he had an extensive track record of raising ineffectiveness claims in direct appeals. Two days after the appointment, the trial court dismissed Mario and Wilcox. JA306-308.

Sixteen days later, on July 25, 1997, the defense moved for a new trial. JA309-311.<sup>1</sup> The motion challenged Mario's allegedly ineffective decision to accept his client's assurances that the blood in Salinas's underwear was not Trevino's. JA309-310. The defense's sole reason for filing the new-trial motion was "[t]o preserve" Trevino's ineffectiveness

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<sup>1</sup> Although the motion was signed by Mario, it appears Langlois was involved in filing it. The defense filed the motion eighteen days after Langlois's appointment and sixteen days after the trial court dismissed Mario and Wilcox from the case. JA298-299, 306-308. Moreover, as Mario later explained, it would have been Langlois's responsibility to conduct an evidentiary hearing on the motion, had the trial court ordered one. JA404.

claim so Langlois could raise it on direct appeal. JA403.

On August 4, 1997, after the new-trial window closed, Langlois further laid the groundwork for an ineffectiveness claim by again supplementing the record on appeal. In particular, Langlois asked the trial court to include in the appellate record “defense counsel’s copy of personal jury information lists [from voir dire,] along with any notes by defense counsel.” JA315. Hinting at his plans to raise an ineffectiveness claim, Langlois emphasized that defense counsel’s records were “essential to a fair determination of an issue raised on appeal.” *Ibid.*

After reviewing Mario and Wilcox’s notes and strategies, Langlois argued that trial counsel’s failure to ask questions during voir dire about DNA evidence was constitutional error. See Appellant’s Brief, *Trevino v. State*, No. AP-72,851, at 3-10 (Tex. Crim. App. Sept. 4, 1998). But in his independent judgment, Langlois argued that fault for the error rested on the trial court’s shoulders, not defense counsel’s. See *id.* at 8 (arguing, in reliance on defense counsel’s notes, that Mario and Wilcox properly requested to reopen voir dire).

Moreover, Langlois was aware of Trevino’s difficult upbringing. See JA318-320. But again in his independent judgment, Langlois did not argue that Mario and Wilcox were ineffective in failing to present additional evidence during the punishment hearing. Cf. *Wiggins v. Smith*, 539 U.S. 510 (2003). In all, Langlois raised twenty-one claims on Trevino’s behalf (two in the new-trial proceeding and nineteen on appeal).

The Texas Court of Criminal Appeals ("CCA") rejected Langlois's arguments and affirmed Trevino's conviction and sentence. JA12-24. Trevino never has argued that Langlois provided ineffective appellate counsel.

4. On January 19, 1998, the CCA appointed Albert Rodriguez to represent Trevino in his state-habeas proceeding. JA2, 427. Rodriguez raised forty-six claims on Trevino's behalf, including sixteen ineffectiveness claims against Mario and Wilcox. JA321-349.

Those claims were not "based only on the trial record." Pet'r Br. 10. To the contrary, Rodriguez requested and received an evidentiary hearing — memorialized in a fifty-eight-page transcript — precisely because his ineffectiveness claims required facts outside of the trial record. JA353-410. At that evidentiary hearing, Rodriguez cross-examined Mario at length regarding the defense's preparations, strategies, and decisions. And Mario explained the defense's thorough mitigation investigation. JA391-402.

Rodriguez did not raise a *Wiggins*-style claim in the state-habeas application and, after hearing Mario's explanation for the defense's punishment-phase strategy, Rodriguez did not amend the application to add such a claim. The state trial court recommended denial of Rodriguez's other forty-six claims, and the CCA adopted that recommendation. JA25-26.

5. More than five years after the trial, on December 26, 2002, Trevino's current counsel filed a second and successive state-habeas application.

There Trevino argued for the first time that Mario and Wilcox were ineffective under *Wiggins* for failing to present the sentencing jury with additional facts about his mother's alcoholism, his poor grades in school, and his absent father. Trevino supported those allegations with affidavits. JA516-581.

The CCA denied Trevino's second state-habeas application on a state procedural ground — namely, the abuse-of-the-writ doctrine. See JA27-28; Tex. Code Crim. Proc. art. 11.071, § 5.

6. Trevino then renewed his procedurally defaulted *Wiggins* claim in federal court. The district court held that Texas's abuse-of-the-writ doctrine constituted an adequate and independent state-law ground, sufficient to bar federal review of the defaulted claim. JA76. Alternatively, the district court held that the claim was meritless because "some of petitioner's purportedly 'new' mitigating evidence was cumulative," and the rest was double-edged because it tended to prove that Trevino is a future danger to society. JA71-72. Balancing Trevino's purportedly "'new' mitigating evidence" against the "particularly brutal and senseless" crime, for which Trevino offered "not even a scintilla of sincere contrition," the district court rejected his ineffectiveness claim on the merits. JA77-78.

The district court did not grant a certificate of appealability ("COA") regarding the effectiveness of Mario, Wilcox, Langlois, or Rodriguez. Nor did it find that jurists of reason could debate that new-trial motions and direct appeals provide meaningful opportunities to vindicate *Wiggins* claims. The district court did find, however, that jurists of reason



could debate whether Trevino is "actually innocent" of the death penalty. JA132.

The Fifth Circuit affirmed. It agreed with the district court that Trevino's purportedly "'new' mitigating evidence" was "somewhat cumulative." JA161-162. The court of appeals further agreed that Trevino fell far short of satisfying the "demanding standard of 'actual innocence.'" JA162.

### SUMMARY OF ARGUMENT

I. The dispute in this case turns on whether the State of Texas provided Trevino a meaningful opportunity to raise his ineffective-assistance-of-trial-counsel claim. The State has ensured that every colorable ineffectiveness claim by every death-sentenced prisoner can be adjudicated on the merits by at least one court. Accordingly, the State's invocation of the procedural-default doctrine here creates none of the equitable concerns identified in *Martinez*.

A. In *Martinez*, this Court solved a specific problem. Arizona "deliberately cho[se]" to force all prisoners to raise their ineffectiveness claims in state-habeas proceedings and without a constitutional right to effective counsel. *Martinez*, 132 S. Ct. at 1318. That choice created a potentially inequitable consequence: if the prisoner failed to raise a substantial claim in the one and only forum that the State provided, the procedural-default doctrine would bar the prisoner from litigating it in any forum.

B. Texas's system does not pose that problem because it enables defendants to raise ineffectiveness claims on direct appeal, where they enjoy a



constitutional right to effective assistance of counsel. The State's choice means that every substantial ineffectiveness claim will be adjudicable on the merits in state or federal court.

1. Texas ensures that the direct-appeal opportunity is a meaningful one. It pays for new, conflict-free, and constitutionally guaranteed attorneys to represent every death-sentenced prisoner on direct appeal of his conviction and sentence. And it pays for investigators and experts to develop claims, including ineffectiveness claims, prior to the appeal. Those are extraordinary steps — and Texas took them precisely to ensure that its prisoners could raise their ineffectiveness claims at the earliest possible opportunity, while memories are still fresh and the Sixth Amendment's protections still apply.

2. Texas also equipped its new, conflict-free, and constitutionally guaranteed appellate lawyers with the procedures necessary to raise and win ineffectiveness claims. In particular, a motion for new trial under Texas Rule of Appellate Procedure 21 allows direct-appeal counsel to supplement the record with evidence developed by investigators and experts regarding trial counsel's strategies or negligence. The CCA, the American Bar Association, and the leading treatise on Texas practice all instruct appellate counsel to use the new-trial mechanism to preserve ineffectiveness claims and to raise them on direct appeal.

3. Many lawyers and prisoners have used the resources and procedures provided by Texas's system to pursue ineffective-assistance-of-trial-counsel claims on direct appeal, in capital and non-capital

cases alike. And these efforts have produced successful *Wiggins*-style claims.

While it is true that an “undeveloped record on direct appeal will be insufficient’ for a defendant to raise or a court to evaluate a claim of trial ineffectiveness,” Pet’r Br. 24-25 (quoting *Thompson v. State*, 9 S.W.3d 808, 814 n.6 (Tex. Crim. App. 1999)), that begs the question. The CCA has held time and again that a motion for a new trial can be employed by a defendant’s new, conflict-free lawyer to make an ineffectiveness claim adjudicable on direct appeal. See, e.g., *Jones*, 2004 WL 231309, at \*8 (collecting cases).

Contrariwise, the CCA refuses to adjudicate such claims *only* where the defendant chooses not to use his new counsel and new-trial hearing to allow previous counsel to testify regarding her trial strategies. See Pet’r Br. 26-27 n.13 (collecting cases). Texas’s provision of new, conflict-free appellate counsel and the State’s new-trial procedures allowed Trevino to question Mario and Wilcox about their punishment-phase strategies. Had Trevino used those procedures, his *Wiggins* claim would have been adjudicable on direct appeal. See *Armstrong v. State*, 2010 WL 359020, at \*5 (Tex. Crim. App. Jan. 27, 2010).

4. Trevino ignores all of this and asserts that Texas law imposes a “division of responsibilities” in capital cases that forces state-habeas counsel to raise ineffectiveness claims, to the exclusion of direct-appeal counsel. That assertion is a fantasy. Trevino’s cited authorities do not require (or even recommend) that state-habeas counsel raise any particular claim, much less do they prohibit direct-

appeal counsel from doing anything. To the contrary, the only relevant guideline that existed during Trevino's state-court proceedings instructed his direct-appeal lawyer to raise *all* colorable claims, regardless of any state procedures restricting when and where those claims could be raised. See American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") 11.9.2(D) (1989).

C. By equipping direct-appeal lawyers to raise ineffectiveness claims, Texas eliminates the danger that "no court will review [those] claims." *Martinez*, 132 S. Ct. at 1316, 1318. If the direct-appeal lawyer raises the claim, it will be exhausted (and hence reviewable in federal court) no matter what the CCA does with it. And if the direct-appeal lawyer does not raise the claim, the failure to do so can constitute "cause" for a subsequent procedural default. See *Carrier*, 477 U.S. at 488. Neither circumstance demands the remedy announced in *Martinez*.

II.A. Trevino's case illustrates the equity of Texas's system. His direct-appeal lawyer knew how to raise arguably meritorious ineffectiveness claims. He was well aware of Trevino's disadvantaged background, and he investigated whether to raise an ineffectiveness claim in this case.

B. Trevino's direct-appeal lawyer declined to raise his *Wiggins* claim because it was weak. The correctness of that strategic choice was confirmed by the federal district court below, which rejected Trevino's claim on the merits — and found that result so clear it did not even warrant a COA.

III.A. Equitable principles demand that this Court consider the interests of the States and victims of violent crime. For the last thirty-five years, this Court has encouraged States to devise postconviction systems, and it has promised that States' choices will be given effect through the procedural-default doctrine. Congress strengthened those assurances in AEDPA, which ensures that States can invest in their habeas systems without fear that federal courts will allow boundless relitigation of state prisoners' claims. Victims' families have equally valid interests in the finality of state-court judgments. Given the States' and victims' interests, it would be inequitable to allow Trevino and others like him to continue litigating their defaulted claims.

B. If this Court changes the rules of the procedural-default game now, equitable principles demand, at a minimum, that the CCA be given an opportunity to adjudicate Trevino's *Wiggins* claim on the merits. But even that medicine is too strong because Texas already has provided a conflict-free direct-appeal lawyer, funds for investigators and experts, a new-trial proceeding, and a direct appeal — all of which were sufficient to vindicate the *Wiggins* claim that Trevino belatedly asserts.

#### ARGUMENT

#### I. "*MARTINEZ* CAUSE" SHOULD NOT EXCUSE A TEXAS PRISONER'S PROCEDURAL DEFAULT OF AN INEFFECTIVENESS CLAIM

Trevino argues that this Court should extend *Martinez* to Texas. To grant such a doctrinal extension, however, would be to allow a "narrow" and "limited" solution to outgrow the equitable problem that occasioned its creation. *Martinez*, 132 S. Ct. at

1315, 1320. *Martinez's* adjustment of procedural-default doctrine should not reach a State, like Texas, that allows criminal defendants to urge ineffective-assistance-of-trial-counsel claims on direct appeal.

**A. *Martinez* Modified The Procedural-Default Doctrine To Solve An Equitable Problem Peculiar To The State System At Issue In That Case**

1. *Martinez* concerned a state system in which "collateral proceedings \* \* \* provide[d] the first occasion to raise a claim of ineffective assistance at trial." 132 S. Ct. at 1315. These "initial-review collateral proceedings," *ibid.*, were a product of "Arizona's decision to bar defendants from raising ineffective-assistance claims on direct appeal," *id.* at 1320. See also *id.* at 1314 (noting that "Arizona law \* \* \* did not permit [defendants] to argue on direct appeal that trial counsel was ineffective").

As the *Martinez* Court recognized, a state-law prohibition of this kind is problematic because it shunts ineffectiveness claims to a counsel-free zone. The criminal defendant enjoys a constitutional right to effective assistance of counsel on direct appeal, see *Lucey*, 469 U.S. at 396, but has no such right in state-habeas proceedings, see *Coleman*, 501 U.S. at 755. "By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed," *Martinez*, 132 S. Ct. at 1318, Arizona created an unacceptable risk that no court, state or federal, would entertain a defendant's ineffectiveness claim:

When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the



prisoner's claim. This Court on direct review of the state proceeding could not consider or adjudicate the claim. And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, *no court will review the prisoner's claims.*

*Id.* at 1316 (emphasis added) (citations omitted).<sup>2</sup>

*Martinez* solved this equitable problem by modifying the procedural-default doctrine to allow review of a substantial ineffectiveness claim in at least one court — the federal habeas court. Cf. *Sykes*, 433 U.S. at 90-91 ("The 'cause'-and-'prejudice' exception \* \* \* will afford an adequate guarantee, we think, that the [procedural-default] rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a

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<sup>2</sup> The leading treatise anticipated the problem identified by the *Martinez* Court, noting the possibility

that a person who never received competent representation at any stage may be convicted, and perhaps even condemned to death, and never obtain any judicial review of the effectiveness of trial counsel — because in the state postconviction proceedings, the petitioner (who may have been pro se) failed properly to raise the ineffectiveness of trial counsel[.] Can that result be justified?

Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1285 (6th ed. 2009) [hereinafter *Hart & Wechsler*]; see also William F. Young, Jr., *Book Review*, 32 Tex. L. Rev. 483, 484 (1954) (reviewing first edition of *Hart & Wechsler*) ("It is clear, is it not, that some of these question marks are gratuitous?").



defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice.”). It accomplished that result by announcing what might be called “*Martinez* cause”: the concept that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Martinez*, 132 S. Ct. at 1315; see also *id.* at 1320.

2. The Court took care to note that its holding created a “limited” and “narrow” exception to the general rule “that an attorney’s ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default.” *Martinez*, 132 S. Ct. at 1315, 1320 (citing *Coleman*, 501 U.S. at 753-755). Accordingly, *Martinez* cause must be understood in the context of the equitable problem it was built to solve, and it should not be extended to a State whose system avoids the problem by allowing defendants to urge ineffectiveness claims on direct appeal.

In a State whose courts stand ready to entertain an ineffectiveness claim on direct appeal, it cannot be said that “no court will review the prisoner’s claims” just because they were not presented to the state-habeas court. *Martinez*, 132 S. Ct. at 1316. To the contrary, two other courts will be available. An error by state-habeas counsel no longer makes it “likely that no state court at any level will hear the prisoner’s claim,” *ibid.*, because the claim will have been presented to the state courts on direct appeal. And even if direct-appeal counsel fails in this task, the federal habeas court will be able to consider the claim because the unconstitutional ineffectiveness of

counsel on direct appeal will serve as cause to excuse the procedural default of the ineffectiveness claim. See *Carrier*, 477 U.S. at 488.

By thus enabling review in both state and federal courts, a State that authorizes consideration of ineffectiveness claims on direct appeal will avoid the equitable problem that *Martinez* cause was meant to solve. Because Texas allows death-sentenced prisoners to pursue ineffectiveness claims on direct appeal, there is no justification for extending *Martinez's* narrow solution in this case.

**B. Texas's System Does Not Pose The Equitable Problem That Prompted The Court To Create *Martinez* Cause**

Texas empowers criminal defendants to raise ineffective-assistance-of-trial-counsel claims on direct appeal. To ensure that the direct-appeal opportunity is a meaningful one, the State provides all death-sentenced prisoners with new, conflict-free appellate counsel, a new-trial mechanism, and funding for investigators and experts to develop their claims. Numerous defendants have used those procedures to raise ineffectiveness claims on direct appeal — including *Wiggins*-style claims.

Trevino nevertheless argues that direct-appeal counsel do not use those procedures because the “division of responsibilities” inherent in Texas’s “dual-track” system for capital cases assigns sole responsibility for ineffectiveness claims to state-habeas counsel. Pet’r Br. 28-29, 33. But Trevino’s division-of-labor theory is imaginary. It is reflected in no state statute, in no state-court decision, and in no State Bar guideline. To the extent the bar offered Trevino’s counsel any guidance regarding what

claims to bring and what claims to omit during the direct-appeal proceedings in this case, it was this: “[a]ppellate counsel should seek, when perfecting the appeal, to present *all* arguably meritorious issues” — including, presumably, ineffective assistance of trial counsel. ABA Guideline 11.9.2(D) (emphasis added).

*1. Texas provides new, conflict-free counsel and investigative funding for direct appeals in all death-penalty cases*

a. Texas does not shunt ineffectiveness claims to a counsel-free zone. See, e.g., *Randle v. State*, 847 S.W.2d 576, 580 (Tex. Crim. App. 1993) (“The timely filed appeal to the court of appeals by appellant is a proper procedure for seeking relief [on an ineffectiveness claim].”). By allowing defendants to urge those claims on direct appeal, Texas ensures that they will enjoy the effective assistance of direct-appeal counsel when complaining about the ineffectiveness of trial counsel. Cf. *Martinez*, 132 S. Ct. at 1318 (Arizona does not).

In cases where a death sentence is imposed, Texas goes to even greater lengths to extend the guiding hand of counsel to a defendant with a potential ineffectiveness claim, by providing for a new lawyer to take over the representation on appeal. Texas law obliges a convicting court to appoint direct-appeal counsel “[a]s soon as practicable after a death sentence is imposed.” Tex. Code Crim. Proc. art. 26.052(j). The presumption in such a case is that trial counsel will not serve as direct-appeal counsel:

The court may not appoint an attorney as counsel on appeal if the attorney represented the defendant at trial, unless:

- (1) the defendant and the attorney request the appointment on the record; and
- (2) the court finds good cause to make the appointment.

*Id.* art. 26.052(k); see also App., *infra*, at 1a-6a (showing the operation of this presumption in the state-court proceedings underlying *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012)). By providing a fresh set of eyes on direct appeal to scrutinize trial counsel's performance, article 26.052(k) significantly enhances a death-sentenced prisoner's ability to file ineffectiveness claims.<sup>3</sup> And the Legislature went even further by paying for direct-appeal counsel in death-penalty cases to use investigators and experts — at taxpayer expense — to develop extra-record claims. See Tex. Code Crim. Proc. art. 26.052(l) ("direct appeal" counsel shall be reimbursed for "expenses incurred for purposes of investigation or expert testimony"); cf. Br. of Amici Curiae Univ. Tex. Capital Punishment Clinic ("U.T. Br.") 12 ("Appellate counsel has no duty to conduct a factual investigation with regard to the underlying case.").

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<sup>3</sup> Congress likewise recognizes the value of a fresh set of eyes. Chapter 154 of Title 28 of the United States Code "provides certain procedural advantages to qualifying States in federal habeas proceedings," *Calderon v. Ashmus*, 523 U.S. 740, 742-743 (1998), which are conditioned upon the creation of a state mechanism for appointing state-habeas counsel for indigent death-row prisoners. Counsel so appointed cannot "have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation." 28 U.S.C. 2261(d).

b. Legislative history confirms that the amendments to article 26.052 were calculated to foster the pursuit of ineffectiveness claims on direct appeal. The Legislature enacted subsection (k) shortly after the CCA rejected a death-sentenced prisoner's argument that his trial counsel "had a conflict of interest that prevented him from assailing his own trial effectiveness." *Ex parte Davis*, 866 S.W.2d 234, 243 (Tex. Crim. App. 1993) (per curiam); see also *Robinson v. State*, 16 S.W.3d 808, 812 (Tex. Crim. App. 2000) (noting potential for "conflict of interest"). The Legislature presumably recognized that ineffective-assistance-of-trial-counsel claims after *Davis* might not be adjudicable on direct appeal without the provision of new, conflict-free appellate counsel. See *Miller v. State*, 33 S.W.3d 257, 260 (Tex. Crim. App. 2000). Therefore, in its first session after *Davis*, the Legislature enacted article 26.052(k). See 1995 Reform Act § 2.

Confirming its intention to make ineffectiveness claims adjudicable on both direct appeal and in state habeas, the Legislature provided for new, conflict-free lawyers in both proceedings. See 1995 Reform Act §§ 1 (state habeas), 2 (direct appeal). As explained by Representative Gallego during debate over a predecessor to the 1995 Reform Act, the purpose of that new statutory right was to empower death-sentenced prisoners to raise ineffectiveness claims. See H.B. 1562 Hr'g Tr. 1. And the Legislature further confirmed that purpose by paying both direct-appeal and state-habeas lawyers in capital cases to hire investigators and experts to develop and raise ineffectiveness claims. See Act of May 22, 1999, 76th Leg., R.S., ch. 837, § 2, Tex. Gen.



Laws 3495, 3495 (1999) (paying for experts and investigators on direct appeal); Act of May 20, 1999, 76th Leg., R.S., ch. 803, § 3(d), Tex. Gen. Laws 3431, 3432-3433 (making parallel payments for state-habeas counsel); Spangenberg Group, *A Study of Representation of Capital Cases in Texas* 166, 169, 171 (1993) (emphasizing importance of funding for investigators and experts to raise ineffectiveness claims, in a report commissioned by the State Bar of Texas).<sup>4</sup>

Members of the Legislature specifically objected to the fact that prisoners were not raising their ineffectiveness claims until the state-habeas proceedings, and "those claims are being litigated 5-8 years after the trial." Hearings on Tex. H.B. 1562 at 4, Before House Comm. on Criminal Jurisprudence, 73d Leg., R.S. (Apr. 14, 1993) (Rep. Casper). The sponsors of the text that eventually found its way into article 26.052(k) emphasized:

Common sense dictates that resolution of claims (such as ineffective assistance of trial counsel \* \* \*) as I stated, common sense dictates that the accurate resolution of those claims necessarily depends on witnesses' memories and the availability of those witnesses. The drafters believe that early detection of those errors and litigating those closer in time to the event of the trial

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<sup>4</sup> The Act of May 22, 1999, amended article 26.052(l) to clarify existing law and to eliminate "delays in payments" that were already being made. Senate Research Center, Bill Analysis 1, Tex. H.B. 1752, 76th Leg., R.S. (May 10, 1999).



will not only inure to the benefit of the defendant but also would not unduly prejudice the state in re-prosecuting and punishing a guilty defendant in the event a new trial should be granted.

*Ibid.* The drafters said nothing about allocating particular claims among the lawyers. Rather, their intention was that each lawyer would bring all available claims at the earliest possible time. See, e.g., House Research Organization, Bill Analysis 6, Tex. H.B. 1562, 73d Leg., R.S. (May 10, 1993) (declaring that “all available claims of error” should be timely raised); House Research Organization, After the Death Sentence: Appeals, Clemency and Representation 13, Special Legislative Report No. 188 (Apr. 4, 1994) (emphasizing that “grounds for virtually all *habeas corpus* appeals are known after a trial” and thus can be raised immediately); Interim Report 57 (lamenting that ineffectiveness claims are not resolved “while witnesses’ memories are still fresh”).

c. Trevino nonetheless repeatedly asserts that Texas law “systematically channels ineffective-assistance-of-trial-counsel claims in death penalty cases to state habeas review.” Pet’r Br. 19; see also *id.* at 2-3, 18, 20, 22, 24-34, 35, 43. Yet he makes no effort to square that assertion with article 26.052(k)’s provision of new, conflict-free appellate counsel. Aside from quoting the provision in an appendix, *id.* at 9a, Trevino does not even acknowledge the existence of subsection (k) in his brief, much less explain what purpose it might serve other than to enable the pursuit of ineffectiveness claims on direct appeal. Worse, he misrepresents article 26.052(l) by

selectively quoting the statute to argue that the Legislature does not pay for extra-record investigations on direct appeal. Compare Pet'r Br. 31-32 & n.18 (arguing subsection (l) does not compensate direct-appeal counsel for "investigation expenses in death-penalty cases"), with subsection (l) (reimbursing "direct appeal" counsel for "investigation" expenses in death-penalty cases). His approach is unfaithful to the language that the Legislature enacted. It is inconsistent with the substantial investments that Texas made to provide new lawyers and investigative funding on direct appeal in death-penalty cases. And it cannot be reconciled with the Legislature's stated intention to speed the resolution of ineffectiveness claims, regardless whether they are brought on direct appeal or in state habeas.

***2. Texas provides a new-trial mechanism for development of ineffectiveness claims***

a. In addition to affording counsel, investigators, and experts who can help defendants urge ineffectiveness claims on direct appeal, Texas provides an important procedural tool toward that end: the motion for new trial. This Court has correctly noted that "[t]he evidence introduced at trial \* \* \* will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis." *Massaro v. United States*, 538 U.S. 500, 505 (2003). By filing a motion for new trial under Rule 21 of the Texas Rules of Appellate Procedure, however, a defendant can supplement the trial record with all the information the appellate court will need to pass upon any

ineffectiveness claims. The CCA has made clear that the motion for new trial is properly and frequently used for this purpose. See, e.g., *Jones*, 2004 WL 231309, at \*8; *Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993); 43A *Texas Practice*, *supra*, § 50:15, at 639.<sup>5</sup>

Given the importance of both the right to counsel at trial and the right to challenge trial counsel's effectiveness on direct appeal, Texas courts long have recognized that a defendant is constitutionally entitled to effective assistance of counsel in connection with the motion for new trial. See *Cooks v. State*, 240 S.W.3d 906, 907-908 (Tex. Crim. App. 2007) (holding that the period for filing a motion for new trial is a "critical stage"); *Oldham v. State*, 977 S.W.2d 354, 360-361 (Tex. Crim. App. 1998) (collecting decisions to same effect from Texas appellate courts); *Trevino v. State*, 565 S.W.2d 938, 940 (Tex. Crim. App. 1978) (holding that the hearing on a motion for new trial is a "critical stage"). Thus, if a lawyer fails to use the new-trial window to develop a colorable ineffectiveness claim, that failure is itself the predicate for an ineffectiveness claim. See *Cooks*, 240 S.W.3d at 910-911.

By filing a motion for new trial, a defendant can secure a hearing and introduce "evidence by affidavit or otherwise." Tex. R. App. P. 21.7. By supplementing the trial record in this way, a defendant allows for appellate consideration of a

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<sup>5</sup> Rule 21 reflects an amendment, effective September 1, 1997, in which former Rules 30-32 were merged and renumbered without any substantive changes.

claim that the record would not otherwise support, such as an ineffectiveness claim. See *Hobbs v. State*, 298 S.W.3d 193, 199 (Tex. Crim. App. 2009) (“The purposes of a new trial hearing are (1) to determine whether the case should be retried or (2) to complete the record for presenting issues on appeal.”); *Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994) (“The purpose of the hearing is for a defendant to fully develop the issues in his motion for new trial.”).

“[W]hen an accused presents a motion for new trial raising matters not determinable from the record, upon which the accused could be entitled to relief, the trial judge abuses his discretion in failing to hold a hearing \* \* \*.” *Reyes*, 849 S.W.2d at 816. To secure such a hearing on an ineffectiveness claim, a defendant must file a new-trial motion supported with an affidavit “assert[ing] reasonable grounds for relief which are not determinable from the record.” *Jordan*, 883 S.W.2d at 665; see also *Smith v. State*, 286 S.W.3d 333, 345 (Tex. Crim. App. 2009) (noting that motion for new trial and supporting affidavit must “raise[] a matter not determinable from the record” and “establish reasonable grounds to believe that [the defendant] could, under *Strickland*, prevail on his claim of ineffective assistance of counsel”). “The affidavit need not reflect each and every component legally required to establish relief, but rather must merely reflect that reasonable grounds exist for holding that such relief could be granted.” *Martinez v. State*, 74 S.W.3d 19, 21-22 (Tex. Crim. App. 2002); accord *McIntire v. State*, 698 S.W.2d 652, 657-658 (Tex. Crim. App. 1985).

b. The motion for new trial is due to be filed within “30 days after[] the date when the trial court

imposes or suspends sentence in open court," Tex. R. App. P. 21.4(a), and it must be "present[ed] \* \* \* to the trial court within 10 days of filing," *id.* R. 21.6; see also *Carranza v. State*, 960 S.W.2d 76, 79 (Tex. Crim. App. 1998) ("present[ation]" means "bringing the motion to the attention or actual notice of the trial court"). The trial court has 75 days after sentencing to rule on a motion for new trial, Tex. R. App. P. 21.8(a), with the motion deemed denied by operation of law upon expiration of that 75-day period, *id.* R. 21.8(c).

Notwithstanding these deadlines, proceedings on a new-trial motion need not be completed within 75 days of sentencing. A trial court can grant a continuance of the hearing on the motion for new trial so that it occurs after the motion has been denied by operation of law. See *Trevino*, 565 S.W.2d at 940-941; *Johnson v. State*, 467 S.W.2d 247, 256 (Tex. Crim. App. 1971). Evidence introduced in such a hearing can be considered on direct appeal. See *Aldrighetti v. State*, 507 S.W.2d 770, 774 (Tex. Crim. App. 1974) (Onion, J., concurring in part and dissenting in part).

Moreover, a motion for new trial can be used to supplement the record even after the cause has gone up on appeal. If a defendant demonstrates that he did not receive adequate representation during the 30-day period for filing a motion for new trial, and that he has "facially plausible claims" that could have been presented in a motion for new trial, then the appellate court will abate the appeal and remand to the trial court so that a motion can be filed and a hearing held. See, e.g., *Cooks*, 240 S.W.3d at 911-912; *Blumenstetter v. State*, 117 S.W.3d 541, 546-547



(Tex. App. 2003); *Garcia v. State*, 97 S.W.3d 343, 349 (Tex. App. 2003); *Champion v. State*, 82 S.W.3d 79, 83-84 (Tex. App. 2002) (per curiam); *Prudhomme v. State*, 28 S.W.3d 114, 120-121 (Tex. App. 2000); *Massingill v. State*, 8 S.W.3d 733, 738 (Tex. App. 1999); cf. *Williams v. State*, 780 S.W.2d 802, 802-803 (Tex. Crim. App. 1989) (per curiam). Trevino suggests that *Martinez* does not extend to Kansas or Michigan because those States “provide a robust mechanism for expanding the record to permit adjudication of ineffective-assistance claims in the context of direct review.” Pet’r Br. 45. Insofar as robustness represents an administrable standard, Texas’s abate-and-remand procedure fares no worse than Kansas’s “*Van Cleave* hearing,” *Rowland v. State*, 219 P.3d 1212, 1218 (Kan. 2009) (citing *State v. Van Cleave*, 716 P.2d 580 (Kan. 1986)), or Michigan’s “*Ginther* hearing,” *People v. Fackelman*, 802 N.W.2d 552, 581 & n.13 (Mich. 2011) (citing *People v. Ginther*, 212 N.W.2d 922 (Mich. 1973)).

**3. Prisoners have used Texas’s system to raise ineffectiveness claims on direct appeal**

a. Texas defendants frequently avail themselves of the motion for new trial as a means of presenting ineffectiveness claims on direct appeal. Indeed, the CCA has noted that a state-habeas proceeding “is not the only mechanism for developing an ineffectiveness claim. An increasing number of cases, including this one, use the motion for new trial as a vehicle for developing the necessary record.” *Jones*, 2004 WL 231309, at \*8; see also *Thompson*, 9 S.W.3d at 814 n.6 (acknowledging that ineffectiveness claim can be urged on direct appeal). Such claims routinely are considered on direct appeal in Texas courts, usually



following supplementation of the record by way of a new-trial hearing.<sup>6</sup>

As demonstrated by the opinions Trevino quotes in his brief, the record at the close of trial typically will be insufficiently developed to support consideration of ineffectiveness claims on direct appeal.<sup>7</sup> But that means only that the record at the close of trial generally is silent regarding “whether [trial counsel’s challenged] actions were of strategic

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<sup>6</sup> See, e.g., *State v. Morales*, 253 S.W.3d 686, 689-691, 696-698 (Tex. Crim. App. 2008); *Robertson v. State*, 187 S.W.3d 475, 480-481, 484-485 (Tex. Crim. App. 2006); *McFarland v. State*, 928 S.W.2d 482, 499-507 (Tex. Crim. App. 1996) (per curiam); *Garcia v. State*, 887 S.W.2d 862, 879-881 (Tex. Crim. App. 1994); *Rosales v. State*, 841 S.W.2d 368, 375-379 (Tex. Crim. App. 1992); *Motley v. State*, 773 S.W.2d 283, 287-292 (Tex. Crim. App. 1989); *Vasquez v. State*, 2012 WL 4826966, at \*5-\*6 (Tex. App. Oct. 11, 2012); *Branch v. State*, 335 S.W.3d 893, 904-910 (Tex. App. 2011); *State v. Mayfield*, 2010 WL 2373274, at \*17-\*25 (Tex. App. June 15, 2010); *Pratt v. State*, 2010 WL 546529, at \*5-\*9 (Tex. App. Feb. 17, 2010); *State v. Choice*, 319 S.W.3d 22, 24-27 (Tex. App. 2008); *Rosa v. State*, 2005 WL 2038175, at \*2-\*4 (Tex. App. Aug. 25, 2005); *State v. Medina*, 2003 WL 21939417, at \*1-\*3 (Tex. App. Aug. 14, 2003); *State v. Pilkinton*, 7 S.W.3d 291, 292-293 (Tex. App. 1999); *State v. Gill*, 967 S.W.2d 540, 540-543 (Tex. App. 1998); *State v. Thomas*, 768 S.W.2d 335, 336-337 (Tex. App. 1989).

<sup>7</sup> See, e.g., *Menefield v. State*, 363 S.W.3d 591, 592-593 (Tex. Crim. App. 2012); *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007); *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002); *Thompson*, 9 S.W.3d at 813-814; *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (per curiam); *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997); *Ex parte Duffy*, 607 S.W.2d 507, 513 (Tex. Crim. App. 1980); *Jackson v. State*, 877 S.W.2d 768, 772 (Tex. Crim. App. 1994) (Baird, J., concurring).

design or the result of negligent conduct.” *Thompson*, 9 S.W.3d at 814. And Texas courts are understandably reluctant to allow a prisoner to condemn a member of the bar as unconstitutionally ineffective without giving the attorney an opportunity to tell her side of the story. See, e.g., *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Rylander v. State*, 101 S.W.3d 107, 110-111 (Tex. Crim. App. 2003); *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002); *Thompson*, 9 S.W.3d at 813-814 & n.5.

b. Trevino ends his state-law discussion here and concludes that ineffectiveness claims cannot be pursued on direct appeal due to insufficiency of the trial record. But that begs the question because the defendant can supplement the trial record by filing a new-trial motion and introducing the necessary evidence, including testimony from trial counsel, at the ensuing hearing. A defendant who urges an ineffectiveness claim on direct appeal after developing the record via the motion for new trial has not “flout[ed] Texas’s procedural scheme,” Pet’r Br. 35, but has followed it to the letter, and Texas courts will stand ready to hear him out. See, e.g., *Lopez v. State*, 343 S.W.3d 137, 144 (Tex. Crim. App. 2011) (“The record could have been supplemented through a hearing on a motion for new trial, but appellant did not produce additional information about trial counsel’s reasons \* \* \*.”); *Reyes*, 849 S.W.2d at 815 (“[W]e hold that ineffective assistance of counsel may be raised in a motion for new trial.”). Consider a few of the many cases in which ineffectiveness claims have been pursued in the manner just described.

In *Armstrong v. State*, the death-sentenced defendant sought to argue “that he was denied the right to effective assistance of counsel when trial counsel failed to investigate and present substantial mitigating evidence to the sentencing jury.” 2010 WL 359020, at \*5. Accordingly, he supplemented the record by filing a motion for new trial and eliciting testimony from trial counsel and a mitigation specialist at the ensuing hearing. *Id.* at \*5-\*6. He then presented his ineffectiveness claim to the CCA for consideration on direct appeal. *Id.* at \*5. The CCA did not “routinely dismiss” or “refuse[] to adjudicate” the claim. Pet’r Br. 26, 33. Rather, it explained that “[w]hile a claim of ineffective assistance of counsel generally may not be addressed on direct appeal because the record is not sufficient to assess counsel’s performance, the record in this case was developed at the hearing on the motion for a new trial.” *Armstrong*, 2010 WL 359020, at \*5. The CCA rejected the ineffectiveness claim on the merits, holding that “Armstrong did not meet his

burden of demonstrating both deficient performance and prejudice as required by *Strickland*.” *Id.* at \*7.<sup>8</sup>

In *Lair v. State*, the defendant “contend[ed] that he received ineffective assistance of counsel during the punishment phase of trial.” 265 S.W.3d 580, 593 (Tex. App. 2008). He “moved for a new trial, and attached affidavits from almost two dozen witnesses, including appellant’s friends, neighbors, and relatives, all of whom stated that they were not contacted by \* \* \* trial counsel and that they were ready, willing, and able to testify on appellant’s behalf at the punishment stage.” *Ibid.* Testimony from trial counsel was introduced at the ensuing hearing. *Id.* at 594. The court took up the ineffectiveness claim on direct appeal, held that the defendant “received ineffective assistance in the punishment phase of [the] trial,” and remanded for a new punishment hearing. *Id.* at 594-596. Similar success stories unfolded in *Shanklin v. State*, 190 S.W.3d 154, 163-166 (Tex. App. 2005), *Freeman v.*

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<sup>8</sup> Trevino contends that “*Armstrong* is the classic exception that proves the rule,” and insinuates that the CCA dismissed the ineffectiveness claim due to inadequacy of the direct-appeal record. Pet’r Br. 43 n.21. He is wrong. When the CCA dismisses ineffectiveness claims on direct appeal without prejudice to state-habeas efforts — a practice authorized in response to potentially inadequate records, *Torres*, 943 S.W.2d at 475 — it is careful to say so explicitly. *E.g.*, *Bone*, 77 S.W.3d at 837 n.30; *Jackson*, 973 S.W.2d at 957; see *Mallett v. State*, 65 S.W.3d 59, 70 (Tex. Crim. App. 2001) (Meyers, J., dissenting) (“[T]he majority should have held that the record was insufficient to evaluate counsel’s performance. In such an instance, the appropriate procedure is to overrule the Sixth Amendment claim without prejudice to the appellant’s ability to dispute counsel’s effectiveness collaterally.”).

*State*, 167 S.W.3d 114, 117-121 (Tex. App. 2005), and *Milburn v. State*, 15 S.W.3d 267, 269-271 (Tex. App. 2000), all of which involved ineffectiveness claims concerning punishment-phase failures.

In *Butler v. State*, the defendant presented an ineffectiveness claim based on counsel's failure to investigate alibi witnesses and present exculpatory evidence to the jury. 716 S.W.2d 48, 51 (Tex. Crim. App. 1986). "The evidence concerning the effectiveness of trial counsel's representation was developed at a motion for new trial hearing held the month following appellant's trial." *Ibid*. The CCA addressed the claim on direct appeal, held "that the performance of \* \* \* trial counsel did not meet the standard of reasonably effective assistance established by either our own caselaw or the Supreme Court in *Strickland*," and "remanded to the trial court for a new trial." *Id.* at 51-57.

c. Thus, it is "inherently unlikely" that an ineffectiveness claim will be adjudicable on direct appeal *only* where the defendant chooses not to give his trial counsel an opportunity to defend herself in a new-trial hearing.<sup>9</sup> *Torres*, 943 S.W.2d at 475; see

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<sup>9</sup> Even that limitation is not absolute, as evidenced by cases in which Texas prisoners prevailed on ineffectiveness claims on direct appeal without supplementing the record through new-trial motions. See, e.g., *Cannon v. State*, 252 S.W.3d 342, 348-350 (Tex. Crim. App. 2008); *Andrews v. State*, 159 S.W.3d 98, 101-104 (Tex. Crim. App. 2005); *Vasquez v. State*, 830 S.W.2d 948, 949-951 (Tex. Crim. App. 1992) (per curiam). The CCA also has rejected ineffectiveness claims on the merits despite the absence of a new-trial motion. See, e.g., *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *Shore v. State*, 2007 WL 4375939, at \*15-\*16 (Tex. Crim. App. Dec. 12, 2007).



also Pet'r Br. 26-27 n.13 (collecting a string cite for that proposition). That opportunity may be hard to come by in certain non-capital cases — for example, where trial counsel and direct-appeal counsel are the same and the claim turns on what was said at trial. See *Robinson*, 16 S.W.3d at 812 (noting preparation of trial transcript and identity of trial/appeal counsel made preservation of claim “virtually impossible”). But neither hurdle applies where, as here, a death-sentenced prisoner receives new, conflict-free direct-appeal counsel and money to investigate a *Wiggins* claim that, by definition, does not turn on evidence presented at trial.

**4. *Trevino's division-of-labor theory has no basis in law or fact***

a. Trevino argues that Texas defendants who have been sentenced to death cannot count on their lawyers to urge ineffectiveness claims on direct appeal, as a consequence of what he calls “the dual-track division of responsibilities between appellate and habeas counsel.” Pet'r Br. 42 n.21; see also *id.* at 7-8, 28-34. *Martinez* cause should be made available to death-sentenced Texas prisoners, the argument goes, because Texas and Arizona are essentially the same in their treatment of ineffectiveness claims on direct appeal. Trevino's argument rests on three incorrect assertions.

*First*, it is simply untrue that section 3(a) of article 11.071 stands for the proposition that “the Texas legislature has placed the burden of investigating and developing trial-ineffectiveness claims in death-penalty cases on state habeas counsel.” Pet'r Br. 30. Section 3(a) deals with the *when*, not the *who*, of an investigation. Consistent



with the Legislature's purpose of speeding resolution of all claims while memories are still fresh, see *supra* p.29, section 3(a) directs the state-habeas lawyer to begin her investigation without awaiting the conclusion of direct appeal, while saying nothing about the independent duties of the direct-appeal lawyer. But nothing in article 11.071 says that state-habeas counsel bears exclusive responsibility for such claims.<sup>10</sup>

Trevino also asserts that, "[b]y statute, Texas has provided special funding to state habeas counsel to investigate and develop extra-record claims." Pet'r Br. 31-32 (citing Tex. Code Crim. Proc. art. 11.071, §§ 2A(a), 3(b), 3(d)). As explained above, however, there is nothing "special" about that funding mechanism. The Legislature also provides funding for direct-appeal counsel and likewise authorizes "[a]dvance payment of expenses anticipated or reimbursement of expenses incurred for purposes of investigation or expert testimony." Tex. Code Crim. Proc. art. 26.052(l).

*Second*, it is equally untrue that the State Bar of Texas's Guidelines create a division of labor between direct-appeal and state-habeas counsel in capital cases. Cf. Pet'r Br. 29-33; State Bar Br. 6-9. When Langlois handled Trevino's direct appeal in 1997, and when Rodriguez handled the state-habeas

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<sup>10</sup> See Tex. Code Crim. Proc. art. 11.071, § 3(a) ("On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus."); see also *id.* § 3(b) (addressing timing of state-habeas counsel's expense request).

proceeding between 1998 and 2001, the State Bar apparently had no guidelines whatsoever. See State Bar Br. 6-7 (citing only a CLE paper from 2002 and guidelines promulgated in 2006). To the extent that *any* bar guidelines affected counsel's division of labor in this case, they were the ABA's 1989 Guidelines, which prescribed identical roles for both Langlois and Rodriguez. Compare ABA Guideline 11.9.2(D) ("Appellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules."), with *id.* 11.9.3(C) ("Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings.").

*Third*, in part because Trevino fabricates his division-of-labor-in-capital-cases theory, he also is wrong to suggest that it is easier to win direct-appeal *Wiggins* claims in non-capital cases. See Pet'r Br. 28, 42 n.21. If anything, the opposite is true because it is only in death-penalty cases that the Legislature guarantees the defendant a new, conflict-free lawyer who can raise ineffectiveness claims on direct appeal. Compare Tex. Code Crim. Proc. 26.052(k) (new direct-appeal counsel in death-penalty cases), with *id.* art. 26.04(j)(2) (counsel's appointment in non-capital cases continues until "appeals are exhausted"). And it is only in death-penalty cases that direct-appeal counsel can request and receive funding for investigators and experts to develop ineffectiveness claims. See *id.* art. 26.052(l).

At bottom, Trevino invents a distinction that exists nowhere in Texas law and attempts to use that

imaginary distinction to shoehorn Texas into the same “‘deliberate choice’” that Arizona made. Pet’r Br. 19 (quoting *Martinez*, 132 S.Ct. at 1318 (alteration omitted)). To the extent that Trevino purports to know “precisely what Texas does *not* want [death-sentenced defendants] to do,” he is mistaken. *Id.* at 36.

b. As if the lack of affirmative support were not enough to doom Trevino’s division-of-labor theory, he also has failed to explain how it can be reconciled with numerous features of Texas law. If the Legislature sought to make ineffectiveness claims the exclusive province of state-habeas lawyers in death-penalty cases, why did it provide for new, conflict-free lawyers on direct appeal in article 26.052(k)? If Texas wanted to prohibit direct-appeal counsel from raising extra-record ineffectiveness claims, why did it provide them with investigators and experts in article 26.052(l)? If the CCA wanted to take responsibility for ineffectiveness claims away from direct-appeal lawyers and give it to state-habeas lawyers, why has that court taken steps to enable such claims on direct appeal? See, e.g., *Lopez*, 343 S.W.3d at 144 (“The record could have been supplemented through a hearing on a motion for new trial, but appellant did not produce additional information about trial counsel’s reasons \* \* \*.”); *Robinson*, 16 S.W.3d at 813 (relaxing forfeiture rule of Tex. R. App. P. 33.1(a) to allow consideration of ineffectiveness claim on direct appeal despite failure to raise it in trial court); *Reyes*, 849 S.W.2d at 815 (“[W]e hold that ineffective assistance of counsel may be raised in a motion for new trial.”).

Most importantly, if Texas lawyers are not supposed to urge ineffectiveness claims on direct appeal, why do they keep bringing them in Texas courts? See, e.g., *Armstrong*, 2010 WL 359020, at \*5. The answer, of course, is that these lawyers realize that nothing about Texas's dual-track system deprives defendants of their constitutional right to effective assistance of counsel on direct appeal. See *Lucey*, 469 U.S. at 396. When a defendant has an arguably meritorious ineffective-assistance-of-trial-counsel claim, direct-appeal counsel has a professional duty to prepare the necessary record and present the claim using the resources and procedural tools Texas has put at her disposal. Direct-appeal counsel would herself be ineffective were she to ignore a viable trial-ineffectiveness claim and leave it in the hands of another lawyer on state habeas, from whom her client is not constitutionally entitled to receive effective assistance. ABA Guideline 11.9.2(D); cf. *Martinez*, 132 S. Ct. at 1318 ("By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims.").

**C. *Martinez* Cause Should Not Be Extended To Texas Because There Is No Equitable Problem To Be Solved**

Were it extended to capital cases in Texas, *Martinez* cause would represent a solution in search of a problem. Unlike Arizona, whose "deliberate[] cho[ice] to move trial-ineffectiveness claims outside of the direct-appeal process" created an unacceptable danger that "no court will review [those] claims," *Martinez*, 132 S. Ct. at 1316, 1318, Texas has crafted

a system that enables state and federal courts to review its prisoners' ineffectiveness claims.

1. Suppose a defendant and his constitutionally guaranteed lawyer urge an ineffectiveness claim on direct appeal in a Texas court after compiling the necessary appellate record by way of a motion for new trial. No matter what happens with that claim in the state-habeas proceedings, multiple courts will have a chance to review it.

Under the very terms of the hypothetical, the state courts will consider the claim on direct appeal. And there will be no procedural default to bar federal-habeas review, the claim having been properly exhausted. See *Brown v. Allen*, 344 U.S. 443, 447 (1953) (holding that exhaustion doctrine does not oblige a prisoner to pursue state habeas relief as to a claim that was fairly presented on direct appeal); *Castille v. Peoples*, 489 U.S. 346, 350 (1989) (same). Indeed, the Fifth Circuit has encountered this situation and held that an ineffectiveness claim is properly exhausted, for federal-habeas purposes, where it has been presented to the Texas courts on direct appeal:

Myers undertook a procedurally proper avenue of review; he raised his ineffective assistance claims on direct appeal in the court of appeals and in his petition for discretionary review before the [Texas] Court of Criminal Appeals. Myers properly exhausted his state remedies as to those grounds of ineffectiveness of counsel that were so raised.

*Myers v. Collins*, 919 F.2d 1074, 1077 (5th Cir. 1990).



2. Now suppose a Texas defendant has the misfortune to draw three bad lawyers in a row. The first lawyer performs so poorly at trial as to give rise to a substantial ineffectiveness claim; the second lawyer fails to press the claim on direct appeal; and the third lawyer neglects to raise the claim during state-habeas proceedings. Despite his rotten luck, this hypothetical defendant will still get a chance to have his claim reviewed by at least one court.

The trial-ineffectiveness claim will be deemed procedurally defaulted on federal habeas due to the failure to present it during the direct appeal and the state-habeas proceedings. But the ineffectiveness of the second (direct-appeal) lawyer in this hypothetical can establish cause to excuse the procedural default, see *Carrier*, 477 U.S. at 488, because the defendant was constitutionally entitled to effective assistance from that lawyer, see *Lucey*, 469 U.S. at 396.<sup>11</sup> Given that *Carrier* cause will open the door to the federal habeas court, there is no reason to use

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<sup>11</sup> The defendant must properly exhaust the ineffective-assistance-of-direct-appeal-counsel claim in state court before he can use it to establish cause for the procedural default. See *Edwards v. Carpenter*, 529 U.S. 446, 450-452 (2000); *Carrier*, 477 U.S. at 488-489. It is unclear whether a procedural default of this claim would be a proper object of *Martinez* cause. Compare *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting) ("There is not a dime's worth of difference between [ineffective-assistance-of-trial-counsel] cases and \* \* \* claims asserting ineffective assistance of appellate counsel."), with *id.* at 1320 (majority opinion) ("Our holding here addresses only the constitutional claims presented in this case \* \* \* "). The question, in any event, is academic here because Trevino never has claimed that his direct-appeal counsel was ineffective.



*Martinez* cause to create a second opening through which to pass the trial-ineffectiveness claim.

## II. TREVINO'S CASE ILLUSTRATES THE EQUITY OF TEXAS'S SYSTEM

Texas's new-trial and direct-appeal procedures were not lost on Trevino's various State-appointed and State-funded lawyers. His appellate counsel knew how to use them to vindicate ineffectiveness claims. His failure to do so here is a product of the meritlessness of Trevino's claim, not of the structure of Texas's system for adjudicating it.

### A. Trevino's State-Appointed Appellate Counsel Routinely Brought Ineffectiveness Claims On Direct Appeal

Four days after Trevino was sentenced, Texas hired a seasoned veteran of the CCA bar to represent him on appeal. Richard Langlois was well versed in raising ineffectiveness claims on direct appeal. He had pursued such claims in past appeals,<sup>12</sup> and has pursued many more since handling Trevino's.<sup>13</sup>

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<sup>12</sup> See, e.g., *Medeiros v. State*, 733 S.W.2d 605 (Tex. App. 1987); *Martinez v. State*, 675 S.W.2d 573 (Tex. App. 1984); *Segundo v. State*, 662 S.W.2d 798 (Tex. App. 1983).

<sup>13</sup> See, e.g., *Mahavier v. State*, 2011 WL 2150429 (Tex. App. June 1, 2011); *Lara v. State*, 2010 WL 3249913 (Tex. App. Aug. 18, 2010); *Chapa v. State*, 2008 WL 2601823 (Tex. App. July 2, 2008); *Sarabia v. State*, 2006 WL 2056109 (Tex. App. July 26, 2006); *Gross v. State*, 2005 WL 1552730 (Tex. App. July 6, 2005); *Ramirez v. State*, 2004 WL 2997747 (Tex. App. Dec. 29, 2004); *Autry v. State*, 27 S.W.3d 177 (Tex. App. 2000); *Chavez v. State*, 6 S.W.3d 66 (Tex. App. 1999); *Huizar v. State*, 966 S.W.2d 702 (Tex. App. 1998), rev'd, 12 S.W.3d 479 (Tex. Crim. App. 2000).

Langlois even used a new-trial motion and live testimony at an evidentiary hearing to develop an ineffectiveness claim premised on trial counsel's failure to call three witnesses, including a DNA expert. See *Coronado v. State*, 2010 WL 1904999 (Tex. App. May 12, 2010).

Indeed, only three weeks before Langlois was appointed to handle Trevino's direct appeal, the CCA adjudicated, on the merits, an ineffectiveness claim that Langlois brought on direct appeal in a different capital case. See *Kerr v. State*, No. 72,261 (Tex. Crim. App. June 18, 1997). The opinion nowhere suggests the claim should have been saved for collateral review. *Ibid.* That result would have been fresh in Langlois's mind when he started to work on Trevino's case.

Langlois used the new-trial window in Trevino's case to develop the factual record for two ineffectiveness claims. JA309-310, 315; *supra* note 1. He further supplemented the record with defense counsel's notes from voir dire. JA315. And Langlois was well aware of Trevino's troubled background and the extent to which trial counsel presented evidence of it during the sentencing hearing. JA318-320. Langlois decided not to use that information to fashion a third ineffectiveness claim because it was hopeless. Langlois's professional judgment was later validated by the federal district judge who found Trevino's ineffectiveness claim so lacking in merit that no jurist of reason would find it debatable. See JA76-79, 132-133.

Trevino argues that it would have been impractical to include a *Wiggins* claim in a new-trial motion because it would require "extensive extra-

record investigation.” Pet’r Br. 42. But he does not explain what makes a *Wiggins* claim different from the two DNA-based claims of ineffectiveness that Langlois developed during the new-trial window. Nor does he explain how it was practical for Langlois to supplement the record with trial counsel’s voir dire notes after the close of the new-trial window. Nor does he explain how it was practical for Langlois to develop ineffectiveness claims for his other clients, including the death-sentenced client in *Kerr*. Nor does he explain how other direct-appeal lawyers were able to use new-trial motions to develop *Wiggins* claims in other cases. See Part I.B.3, *supra*.

Indeed, the very premise of a *Wiggins* claim is that trial counsel failed to discover mitigating evidence that was at her fingertips — evidence that any minimally competent lawyer would have easily grasped. See, e.g., Agreed Findings of Fact and Conclusions of Law at 2, *Ex parte Lucero*, No. 48,593-01-C (251st Dist. Ct., Potter County, Tex. Feb. 9, 2010) (granting relief because “months before trial, lead counsel obtained a detailed affidavit showing the need for a mitigating specialist” and did nothing with it); *Ex parte Kerr*, 2009 WL 874005, at \*2 (Tex. Crim. App. Apr. 1, 2009) (granting relief because trial counsel did not timely ask defendant for names of character witnesses). If mitigating evidence requires heroic effort to uncover — akin to the exhaustive work performed at innocence projects and capital-punishment clinics, cf. U.T. Br. — then the evidence by its very nature is beyond *Wiggins*’s domain. See *Rompilla v. Beard*, 545 U.S. 374, 382-383 (2005) (noting “this Court’s recognition that the duty to investigate does not force defense lawyers to

scour the globe on the off chance something will turn up"); *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (holding "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment").

**B. Trevino Did Not Raise His *Wiggins* Claim On Direct Appeal Because It Is Far From Substantial**

1. Trevino repeatedly claims that his "trial counsel failed to conduct any mitigation investigation at all." Pet'r Br. 21; see also *id.* at 2, 6, 10, 47. That is demonstrably false. Trevino's defense team conducted a thorough mitigation investigation, and they began that investigation many months before trial. Once appointed, they immediately hired a private investigator, who remained a member of the trial team until the very end. JA194, 302-306. Nearly one year before the trial began, Mario, Wilcox, and Villanueva started probing Trevino's past for mitigating evidence. Their goal was "to find a family member that could give us some idea as to where or how Mr. Trevino grew up. What was going on with his life. What were the circumstances \* \* \* regarding his past." JA391.

In pursuit of such evidence, Villanueva interviewed Trevino's aunt nearly one year before trial, and interviewed her again shortly before she testified at the punishment phase. JA200, 303. The defense team twice interviewed Trevino's stepfather. JA303, 382, 392. And Mario testified that they did the "best [they] could" to contact Trevino's mother, JA391-392, who lived less than two hours away, but her alcoholism made her impossible to reach. JA285. This challenge was compounded by Trevino's refusal

to help the team build a mitigation case, leading Villanueva to lament in an e-mail that Trevino “never did furnish us with any leads, other than the cousin that testified against him.” JA581; see also JA392 (testimony of Mario that “if he had given us names of anyone, we certainly would have tracked them down”).

Undeterred by Trevino’s refusal to cooperate, Villanueva dug into his educational background, JA277-278, 286, 393, but did not find anything that “would be beneficial to [the defense],” JA393. The defense also pursued aggressive written discovery for any mitigating evidence in the State’s possession. JA203-217 (propounding sixty-nine requests for production); JA220-222 (propounding catch-all requests for mitigating evidence). And the defense was fully aware of Trevino’s prior felonies, which the prosecution would use to prove his future dangerousness. JA200-201; cf. *Rompilla*, 545 U.S. at 384.

After conducting its investigation, the defense called Trevino’s aunt to testify on his behalf. She knew Trevino “all his life” and portrayed him as a hard-working and loving father who grew up in squalor. She told the jury that Trevino was raised by a single mother. JA285-286. She told the jury that Trevino’s mother was only sixteen years old when she gave birth to him, JA286, and that Trevino’s mother had such a terrible “alcohol problem” that it disabled her from testifying on her son’s behalf, JA285-286. She said that Trevino “did okay” in school until he dropped out. JA286. She told the jury that Trevino “would always” take care of her children while she was at work; that her girls “loved



him [and] were attached to him.” JA288. Mario reminded the jury of the aunt’s testimony during his closing statement and used it to argue that Trevino was just a “kid [who]’s lost.” 24RR25-26.

2. More than eight years after his conviction, JA27-28, Trevino filed a state-habeas application, claiming among other things that his trial counsel were ineffective for failing to discover and present mitigating evidence. Excusing the procedural bar to that claim would be an empty exercise in collateral damage. Much of Trevino’s evidence is cumulative of testimony at trial, as the federal district court recognized in refusing even to grant a COA. See JA72-78, 132-133 (repeatedly referring to “Petitioner’s ‘new’ mitigating evidence”); *Bobby v. Van Hook*, 558 U.S. 4, 19 (2009) (per curiam) (“[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.”).

To the extent Trevino’s “‘new’ mitigating evidence” is not cumulative, JA77, it is inconsistent with the defense’s chosen theory at trial. See, e.g., *Richter*, 131 S. Ct. at 789. The defense argued that Trevino was a good “kid” who grew up in a tough environment but nonetheless managed to be a loving uncle. 24RR25-26. It would have been inconsistent with that strategy to argue — as he now does, using the 20/20 vision of hindsight — that Trevino is a hopeless drug abuser and lifelong gang member with brain damage.



### III. TEXAS'S EQUITABLE INTERESTS FAR OUTWEIGH TREVINO'S

It is a “common expression[] that courts of equity delight to do justice, and not by halves.” Joseph Story, *Commentaries on Equity Pleadings* § 72, at 74 (1894) (citing *Knight v. Knight*, 3 P. Wms. 331, 334, 24 Eng. Rep. 1088, 1089 (Ch. 1734)); see also *Corbet v. Johnson*, 6 F. Cas. 524, 525 (C.C.D. Va. 1805) (Marshall, C.J.). Therefore, in deciding whether to extend *Martinez*’s equitable remedy, this Court should consider the interests of the State and victims’ families, both of whom have a right to finality in state-court judgments. Those rights must be balanced against the interests of prisoners, like Trevino, who can satisfy neither the actual-innocence nor the existing cause-and-prejudice exceptions to the procedural-default doctrine. That balance tips decidedly in the State’s favor.

#### A. Texas Built Its Postconviction System In Reliance On This Court’s Assurances

1. Texas has established robust procedures for postconviction review, largely in response to assurances from the Court. Justice Brennan, an early advocate for state postconviction remedies, urged the States to adopt some version of the Uniform Postconviction Procedures Act, and he promised that if States “assumed this burden,” their criminal convictions would enjoy “[g]reater finality,” and that “the exhaustion requirement” would assure “state primacy” in adjudicating constitutional claims. *Case v. Nebraska*, 381 U.S. 336, 344-347 (1965) (Brennan, J., concurring). Writing for a majority of the Court, Justice Brennan attributed the rising friction between state and federal courts to the

States' refusal to establish these postconviction remedies. *Henry v. Mississippi*, 379 U.S. 443, 453 (1965) ("It has been suggested that this friction might be ameliorated if the States would look upon our decisions \* \* \* as affording them an opportunity to provide state procedures, direct or collateral, for a full airing of federal claims."); see also *Case*, 381 U.S. at 339-340 (Clark, J., concurring) (observing "the practical answer to the problem" was "the enactment by the several States of postconviction remedy statutes"). Texas soon responded by granting defendants a procedural right to access postconviction remedies, see *Ex parte Young*, 418 S.W.2d 824 (Tex. Crim. App. 1967), a right that has expanded over time to resemble federal habeas itself.

The Legislature built these structures, at great expense to Texas's taxpayers, in reliance on the Court's repeated assurances that the procedural-default doctrine would protect the meaningfulness of the state-postconviction process. Procedural default does so by channeling claims into the state system and affording state courts an opportunity to "correct[] their own mistakes." *Coleman*, 501 U.S. at 732. The doctrine ensures the accuracy of criminal judgments by forcing habeas applicants to present their arguments to state courts "when the recollections of witnesses are freshest, not years later in a federal habeas proceeding." *Sykes*, 433 U.S. at 88. It allows the trial judge "who observed the demeanor of [the] witnesses" during trial "to make the factual determinations necessary for properly deciding the federal constitutional question." *Ibid.* And, by channeling ineffectiveness claims into state court, the doctrine improves the quality of indigent

representation by allowing state courts to hold accountable state-funded lawyers who botch criminal trials. Cf. Eve B. Primus, *Structural Reform in Criminal Defense*, 92 Cornell L. Rev. 679, 714 (2007) (cited in *Martinez*, 132 S. Ct. at 1318) (“[T]he sooner these claims are raised, the more likely it is that the legal community will remember the case and the circumstances of the conviction. As a result, the trial judge and prosecutor are more likely to be upset at the prospect of retrying the case, which will increase the stigma associated with the offending attorney’s failures.”).

2. The States also have built their postconviction systems with the assurance that the federal courts would respect both the procedures of state courts and the finality of their judgments. See *Coleman*, 501 U.S. at 729-732; *Isaac*, 456 U.S. at 126-129; *Sykes*, 433 U.S. at 87-88.

Congress strengthened those assurances in AEDPA’s relitigation bar, 28 U.S.C. 2254(d). See *Hart & Wechsler*, *supra*, at 1158 (identifying section 2254(d) as “AEDPA’s most important provision”). When the relitigation bar operates as Congress intended, federal courts may adjudicate de novo only a vanishingly small set of claims. See *Richter*, 131 S. Ct. at 787 (“Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions.”); *Cone v. Bell*, 556 U.S. 449, 476 (2009) (Roberts, C.J., concurring in the judgment) (noting that inapplicability of relitigation bar depended on “unusual facts” and “unique procedural posture”). That assurance allows States to invest heavily in

their postconviction systems with confidence that their efforts will not lightly be undone and ordered redone at even greater expense.

Trevino, however, urges this Court to dramatically alter both the relitigation bar's reach and the rules under which the States have long played. The CCA relied on this Court's procedural-default doctrine and rejected Trevino's *Wiggins* claim on a state procedural ground without adjudicating its merits. See JA27-28; cf. 28 U.S.C. 2254(d) (limiting the relitigation bar "to any claim that was adjudicated on the merits in State court proceedings"). If this Court now excuses that default, Trevino will get to litigate in federal court in the first instance the effectiveness of State-appointed and State-funded lawyers. He could do so without giving those men an opportunity to explain their litigation strategies in state court, without giving the state courts an opportunity to evaluate the effectiveness of the lawyers they appointed, and without giving the CCA's judgment the same protection that AEDPA demands for state-court adjudications of every *Wiggins* claim before this one. And Trevino would accomplish those feats on the basis of an argument (ineffective assistance of state-habeas counsel) that the CCA could not possibly have anticipated. See *Coleman*, 501 U.S. at 752-753. There is nothing equitable about that.

3. The inequities would not end there. Lured by the potential of avoiding AEDPA and the promise of substantially delaying a death sentence, future capital-defense counsel will have incentives to "sandbag[]" state courts, *Sykes*, 433 U.S. at 89, reserve their claims until federal habeas, and then

use that purportedly ineffective strategy to overcome the default. Cf. Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 Hofstra L. Rev. 1181, 1191-1193 (2003) (suggesting that defense counsel in capital cases have an ethical obligation to "fall on his or her sword," while insisting that "[t]his is not a plea for counsel to lie or make it up").

These blows to the States' postconviction systems would be made worse by their frequency. In Texas, as in other States, almost half of all capital-habeas applications are dismissed at least in part on procedural-default grounds. See Annual Report for the Texas Judiciary 2011 at 2, <http://www.courts.state.tx.us/pubs/AR2011/toc.htm> (visited Jan. 13, 2013) (19 of 44 applications); cf. *Hart & Wechsler, supra*, at 1217. And ineffective assistance is far and away the most common claim raised in those applications. U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Habeas Corpus Review Challenging State Court Criminal Convictions 14 (1995). Indeed, no case has been cited more often by the federal courts of appeals (or the state courts) than *Strickland*. Frank B. Cross & James F. Spriggs, II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 Emory L.J. 407, 434 (2010).

**B. If This Court Changes The Rules, State Courts Should Have An Opportunity To Adjudicate Defaulted Claims On The Merits**

When the CCA issued its procedural-default ruling in 2005, it had no reason to doubt the adequacy of the state-law ground supporting its denial of Trevino's habeas application. If this Court



changes the rules now, equity demands at a minimum that the CCA have an opportunity to reevaluate its procedural ruling and adjudicate Trevino's *Wiggins* claim on the merits.

State courts have proven willing to forgive or ignore procedural defaults in response to developments in federal-habeas doctrine. In the wake of *Fay v. Noia*, 372 U.S. 391 (1963), some States modified their procedural-default doctrines to mirror the new deliberate-bypass standard. See Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1156-1158 (1986). Others engaged in what Professor Meltzer terms "pragmatic acquiescence," ignoring any procedural default as a matter of expedience and reaching the merits of federal claims. *Ibid.*

Texas courts likewise have a proven track record of hearing once-defaulted claims on the merits under appropriate circumstances. For example, the CCA has created equitable exceptions to the state-law bar on successive petitions — including an exception for ineffective assistance of state-habeas counsel. See, e.g., *Ex parte Medina*, 361 S.W.3d 633, 642-643 (Tex. Crim. App. 2011) (per curiam); *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000); *Ex parte Evans*, 964 S.W.2d 643, 647 (Tex. Crim. App. 1998). And the CCA has allowed prisoners to reopen their habeas applications and raise defaulted claims. See, e.g., *Ex parte Matamoros*, 2011 WL 6241295 (Tex. Crim. App. Dec. 14, 2011) (per curiam); *Ex parte Moreno*, 245 S.W.3d 419, 420 (Tex. Crim. App. 2008). Forcing claimants like Trevino to return to state court, and thereby allowing the CCA to adjudicate those claims on the merits, would dilute the strong



medicine of granting habeas review on long-defaulted claims. See *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting) (observing that habeas "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority").

Even that tincture, however, is far too potent. Texas already has empowered prisoners to raise ineffectiveness claims in new-trial motions and on direct appeal with conflict-free counsel, and many prisoners have done so under the Sixth Amendment's existing protections. That path was open to Trevino and his State-appointed and State-funded attorneys, who raised 67 claims on his behalf. No principle of equity demands reopening the state or federal courts and allowing Trevino to raise a 68th.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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January 2013

**APPENDIX**

**NO. 96-634-C**

**THE STATE OF TEXAS    IN THE DISTRICT COURT  
V.                            54TH JUDICIAL DISTRICT  
RAMIRO RUBI IBARRA    McLENNAN COUNTY, TEXAS**

**HEARING**

**FILED IN  
COURT OF CRIMINAL APPEALS**

**MAR 13 1998**

**Troy C. Bennett, Jr., Clerk**

**APPEARANCES:**

**Hon. Walter Reaves  
Hon. Gerald Villarreal  
Attorneys at Law  
Waco, Texas**

**Interpreter: Dan Carroll**

**BE IT REMEMBERED THAT on the 16th day of  
January, 1998, the following proceedings were held,  
to-wit:**

**(whereupon the following proceedings were held on  
the 16th day of January, 1998.)**

**COURT: You are Ramiro Rubi Ibarra?**

**DEFENDANT: Yes, sir.**

**COURT: Mr. Ibarra, you have previously been  
sentenced to death for Capital Murder in Cause  
Number 96-634-C, you are here this morning with  
Mr. Walter Reaves, who represented you at your  
trial, is that correct?**

**DEFENDANT: Yes, sir.**

COURT: Also last week I appointed Mr. Gerald Villarreal to assist the Court in determining what you wish to do in reference to your Court appointed Attorney on Appeal. Mr. Reaves represented you, and Mr. Angel Gavito represented you during the trial, is that correct?

DEFENDANT: Yes, sir.

COURT: And were you satisfied with the representation that they rendered for you during the trial of your criminal case?

DEFENDANT: I don't know how to respond to your question, because I don't understand the process. The only thing I know is that they did whatever they were able to do in my favor. It was in their hands.

COURT: And do you think they did whatever they were able to do in reference to your case?

DEFENDANT: The man that was standing here, even though I couldn't understand what he was saying, I think he represented me in good faith.

COURT: You are talking about Mr. Reaves?

DEFENDANT: Yes, sir.

COURT: Now, last week, I believe that Mr. Gerald Villarreal, and Mr. Carroll came to see you.

MR. CARROLL: Yesterday.

COURT: Yesterday they came to see you, is that correct?

DEFENDANT: Yes.

COURT: And you understand that the law provides where you are indigent you are entitled to

an Attorney to represent you in appealing your conviction, do you understand that?

DEFENDANT: Now that you are telling me that I do understand.

COURT: The law provides that the Court may not appoint the Attorney to represent you on appeal who represented you in the trial of your case, unless the Defendant, that is you, and your Attorney request his appointment in the case. Do you understand that?

DEFENDANT: Yes.

COURT: And I appointed Mr. Villarreal to come out and talk to you, and assist you in making that decision, and did he come and talk to you yesterday in reference to your Attorney, your Court appointed Attorney on appeal?

DEFENDANT: Yes, sir, they came and talked to me.

COURT: And Mr. Villarreal is a spanish speaker, is that correct?

DEFENDANT: Yes, sir.

COURT: And also Mr. Carroll who was the Interpreter at your trial, and has been the Interpreter for the Court throughout these proceedings, is that correct?

DEFENDANT: Yes, sir.

COURT: And didy ou go over the fact with Mr. Villarreal that the Court would appoint a different attorney on appeal if you so requested?

DEFENDANT: Yes.

COURT: And the only way that I would appoint Mr. Walter Reaves was, if that was what you wanted me to do?

DEFENDANT: Yes, sir.

COURT: And did you go over that with him, Mr. Villarreal?

MR. VILLARREAL: Yes.

COURT: Now, what decision have you come to in reference to your Court appointed Attorney on appeal?

DEFENDANT: If he will accept to represent me.

COURT: And do you agree to represent him?

MR. REAVES: Yes.

COURT: Is this a decision after you went over this matter with Mr. Villarreal to help you to make this determination of who you wanted on appeal as your Attorney?

DEFENDANT: Yes, sir.

COURT: Well the Court is going to find good cause to make the appointment of Mr. Walter Reaves, and the good cause is that Mr. Reaves is completely familiar with this case. He has represented the Defendant throughout the trial, and throughout the pre-trial procedure. He is an experienced trial Lawyer in McLennan County, and in other Counties. He has handled many Capital Murder cases. He has been appointed by the Court numerous times in representing defendants in Capital Murder cases. He has filed numerous briefs in Capital Murder cases, and in many other cases.



The Court regularly appoints Mr. Reaves as an Attorney representing defendants on appeal and in trial, and is familiar with the work product of Mr. Reaves, and the Court further finds that Mr. Reaves is well qualified and competent, and capable of representing the defendant in this particular case, and that there is good cause to appoint Walter Reaves as the Attorney on appeal. Is there any other matter?

MR. REAVES: Yes, your Honor, I was talking to Mr. Carroll this morning. I might have done this before since I have represented a Spanish speaking person, but I did tell Mr. Ibarra this morning I will communicate, and let him communicate with me, and that I would use Mr. Carroll to translate my correspondence, and translate my motions and brief, if that is all right with the Court.

COURT: That is correct. That's all.

**THE STATE OF TEXAS  
COUNTY OF McLENNAN**

**I, KAY SMITH, OFFICIAL REPORTER, 54th  
Judicial District Court of McLennan County, Texas,  
do hereby certify that the within and foregoing is a  
full, true, complete and correct transcript of the  
proceedings had in the above entitled and numbered  
cause at the time and place as shown herein, to the  
best of my knowledge, skill and ability, and was  
typed by me or under my supervision and direction.**

**Kay Smith  
Certified Shorthand Reporter  
Certification No. 116  
Certification Expires 12-31-  
Official Court Reporter  
54th Judicial District Court Courthouse  
Waco, Texas 76701  
817 757-5051**

# **REPLY BRIEF**

IN THE  
**Supreme Court of the United States**

---

CARLOS TREVINO,

*Petitioner,*

*v.*

RICK THALER, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

REPLY BRIEF FOR PETITIONER

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IN THE  
**Supreme Court of the United States**

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No. 11-10189

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CARLOS TREVINO,

*Petitioner,*

*v.*

RICK THALER, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

REPLY BRIEF FOR PETITIONER

---

Respondent stakes his case on the assertion that Texas “instructs” death-sentenced prisoners to raise ineffective-assistance claims on direct appeal and gives them a “meaningful opportunity” to do so through a motion for new trial. That assertion utterly distorts Texas law and practice. It contradicts the judgments of the Texas Court of Criminal Appeals (TCCA), the Texas Legislature, the State Bar, Texas defense lawyers, and Texas prosecutors. It cannot be credited.

Certainly, respondent’s claims cannot obscure one fundamental point: *This* case is the functional equiva-

lent of *Martinez*. Texas's procedures precluded Carlos Trevino from raising his ineffective-assistance claim on direct appeal. His habeas application was his first and only opportunity to do so in state court.<sup>1</sup>

## ARGUMENT

### I. TREVINO'S CASE IS FUNCTIONALLY IDENTICAL TO *MARTINEZ*

#### A. Trevino Could Not Develop His *Wiggins* Claim On Direct Appeal

Two obstacles precluded Trevino from raising his *Wiggins* claim on direct review.

*First*, while the new-trial deadline expired 30 days after sentencing, the transcript of Trevino's penalty-phase trial was not available until *seven months* after sentencing. JA285, 292. Without the transcript, Trevino could not challenge trial counsel's penalty-phase performance or show how a different approach might have altered the outcome. In identical circumstances, the TCCA has found there is "no meaningful or realistic opportunity" to present an ineffective-assistance claim in a new-trial motion. *Robinson v. State*, 16 S.W.3d 808, 813 (2000); *see id.* at 811, 813 n.7.

Respondent concedes (at 41) that such delays make success on a new-trial motion "hard to come by." *See also* 42 Dix & Schmolesky, *Texas Practice: Criminal*

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<sup>1</sup> Much could be said about respondent's tendentious "Factual Background." *E.g.*, Br. 7 (accusing Trevino of "falsely" downplaying details of the "heinous[]" crime). It suffices that the factual recitation in Trevino's opening brief accords entirely with the district court's, JA80-84, and that the issue in this case is *Wiggins*—which accepts that the defendant committed a horrible murder, but might deserve a punishment short of death, *Wiggins v. Smith*, 589 U.S. 510, 585 (2003).



*Practice and Procedure* § 29:98 (3d ed. 2011); *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (transcript is “generally” not available before new-trial deadline). He responds only (at 41) that *Wiggins* claims do not “turn on evidence presented at trial.” This Court has explained, however, that a court must assess prejudice by weighing newly discovered mitigation evidence against the trial evidence. *See Wiggins v. Smith*, 539 U.S. 510, 534, 536 (2003); *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000). That analysis cannot be done without knowing what evidence was presented at trial.

The State has elsewhere acknowledged this requirement. In *Sprouse v. State*, the State argued that a several-month delay in the appointment of appellate counsel was harmless because the record was not available within the new-trial deadline. State Br. 15-16, 2005 WL 3142637 (Tex. Crim. App. Sept. 12, 2005). The State explained:

Without access to that record, [defendant]’s new counsel would have had little basis for attacking the performance of trial counsel.

*Id.* 16. The TCCA agreed. *Sprouse v. State*, 2007 WL 283152, at \*7 (Jan. 31, 2007).

*Second*, Trevino’s appellate counsel could not have substantiated a *Wiggins* claim in the days between his appointment and the expiration of the 30-day new-trial window. *See Jackson v. State*, 877 S.W.2d 768, 772 & n.3 (Tex. Crim. App. 1994) (Baird, J., concurring); *see also* Clinics Br. 26-38. Respondent disagrees (at 50) on the ground that *Wiggins* concerns only counsel’s failure to discover mitigating evidence “at her fingertips.” But *Wiggins* also reaches unreasonable decisions to limit a mitigation investigation without pursuing promising

leads. See 539 U.S. at 521-522. And to establish prejudice, new counsel must follow the leads far enough to show a reasonable probability that the jury, if confronted with the evidence trial counsel failed to discover, would have returned a different sentence. *Id.* at 534-536.

Consider the evidence that Trevino suffers from fetal alcohol syndrome. JA66-67. Merely “uncover[ing]” this claim hardly required “heroic” efforts. Resp. Br. 50. Had trial counsel ever spoken to Trevino’s mother, he could have learned how heavily she drank during her pregnancy. When federal habeas counsel interviewed her, Trevino’s mother said she “usually dr[a]nk 18 to 24 cans of Budweiser, every day during [her] pregnancy with Carlos.” JA531.

Once that evidence was uncovered, however, a far greater effort was required to prove the effects his mother’s drinking had on Trevino and to establish its relevance to Trevino’s moral culpability. To make that showing, federal habeas counsel obtained affidavits from several of Trevino’s other relatives and associates. JA521-523, 530-533, 567-576. Counsel requested and received Trevino’s school records and prison medical records, JA537; Habeas Pet. Ex. 29, *Trevino v. Dretke*, No. 01-cv-306 (W.D. Tex. Dec. 8, 2008), and made “[e]xtensive” though unsuccessful efforts to locate childhood medical records, JA556. A mitigation specialist reviewed these materials, interviewed family members, and prepared a social-history report. JA524-529. A forensic psychologist interviewed Trevino and his mother, “administered a comprehensive battery of psychological tests,” reviewed the compiled records, and drafted a psychological evaluation. JA534-566. Nothing approaching this investigation could have been completed in 30 days.

## B. The New-Trial Motion Is Not A Practicable Option

According to respondent, other features of Texas law would have enabled Trevino to develop his ineffective-assistance claim through a new-trial motion despite the 30-day deadline. The procedures respondent cites do not do the work he claims. The new-trial motion was not a feasible option for Trevino—nor for any similarly situated death-sentenced Texas defendant. The leading treatise on Texas procedure thus concludes that criminal defendants “often and perhaps nearly always” do *not* use the new-trial motion to develop ineffective-assistance claims. 42 *Texas Practice* § 29:98.

1. Respondent notes a defendant need only support his new-trial motion with a simple affidavit “assert[ing] reasonable grounds for relief which are not determinable from the record.” Br. 33 (quoting *Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994)). This standard is far more demanding than respondent suggests.

To secure a hearing on a new-trial motion alleging trial-ineffectiveness, the defendant must “specifically set[] out the factual basis for the claim,” including facts supporting *Strickland* prejudice. *Smith v. State*, 286 S.W.3d 333, 339 (Tex. Crim. App. 2009). Conclusory allegations unsupported by specific facts are insufficient. *Id.* at 338-345. When a defendant challenges trial counsel’s failure to investigate, the affidavit must specify why counsel’s investigation was deficient and identify the evidence any “further investigation would have revealed.” *Jordan*, 883 S.W.2d at 665. New counsel must complete a substantial investigation to make this showing. This cannot be done in 30 days, even assuming appellate counsel is appointed and the transcript is

completed immediately after verdict (which is rarely true). *See* Clinics Br. 22-38.

2. Respondent claims (at 34) that “proceedings on a new-trial motion need not be completed” within the 75-day period the trial court has to rule on the motion. The Texas Rules say the opposite. *See* Tex. R. App. P. 21.8. Respondent cites three cases decided in the 1970s, but the Legislature amended the new-trial rules in 1981. Those amendments “for the first time *expressly* provided that, once the seventy-five days ha[ve] passed, if the trial court ha[s] not already ruled upon it, the motion w[ill] be deemed overruled by operation of law.” *State v. Moore*, 225 S.W.3d 556, 563 (Tex. Crim. App. 2007).

Under the present rules, “the movant must strictly adhere” to the deadlines. *State v. Holloway*, 360 S.W.3d 480, 486 (Tex. Crim. App. 2012). Likewise, “the authority (if not the jurisdiction) of the trial court to act on a motion for new trial cannot extend beyond seventy-five days after the imposition or suspension of sentence in open court.” *Moore*, 225 S.W.3d at 569.

3. Respondent finally asserts (at 35) that Texas law offers an “abate-and-remand procedure,” under which a defendant who has appealed may return to the trial court to develop the factual basis of an ineffective-assistance claim. Texas courts have utilized this “procedure” in only one context: as a remedy for the constitutional violation that occurs when a defendant is deprived of counsel during the new-trial window and suffers prejudice from the deprivation. *See, e.g., Prudhomme v. State*, 28 S.W.3d 114, 120-121 (Tex. App. 2000); *Cooks v. State*, 240 S.W.3d 906, 911-912 (Tex. Crim. App. 2007).



Respondent apparently envisions that death-sentenced Texas defendants can practicably raise ineffective-assistance claims on direct appeal by somehow inducing a constitutional violation so that they may, as a remedy for that violation, seek more time and an adequate forum to develop their claims. This contrivance is not an ordinary feature of Texas procedure. Nor can respondent seriously suggest that Texas prefers that defendants proceed this way or that this "abate-and-remand" device resembles the remand procedures other States make available as a matter of course where a defendant demonstrates "valid grounds" for a new trial, *State v. Van Cleave*, 716 P.2d 580, 583 (Kan. 1986); see Utah Br. 7 & n.2 (discussing Michigan procedure).<sup>2</sup>

In the vast majority of cases, the new-trial motion thus provides no practicable opportunity to develop an ineffective-assistance claim. In Trevino's case, it certainly would have been impossible.

### C. Respondent's Account Of Trevino's Direct Appeal Is Baseless

Ignoring these realities, respondent supplies his own explanation why Trevino did not raise his *Wiggins* claim on direct review. Respondent represents (e.g., 13-14, 48-49) that Trevino's appellate counsel, Richard Langlois, was "well aware of Trevino's troubled background" and had ample time and procedural avenues to raise a *Wiggins* claim, but chose not to because he

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<sup>2</sup> See also Pet. Br. 45. Whether *Martinez* applies in jurisdictions with other procedures presents a distinct question. See, e.g., Utah Br. 7, 9 & n.6 (at least six States provide reliable remand mechanisms for expanding the record); *id.* 10 & n.8 (at least nine States require defendants to raise ineffectiveness claims "at the first available opportunity").

formed an "independent judgment" that such a claim would have no merit. That is untrue.

There is zero evidence that Langlois was "aware of Trevino's troubled background" or ever considered a *Wiggins* claim. Respondent cites only Langlois's brief in Trevino's appeal, which argued that the trial evidence was insufficient to support the jury's future-dangerousness finding. Br. 14, 49 (citing JA318-320). That brief was filed over a year after the new-trial deadline, and the statements in it about Trevino's background rested exclusively on what Langlois learned from the trial record. JA319-320 (citing only trial-record evidence); see Appellant Br. 26-40, *Trevino v. State*, No. 72,851 (Tex. Crim. App. Sept. 4, 1998). It indicates no investigation or awareness of Trevino's background at all, let alone any that could have been put to use in a new-trial motion.

There is likewise zero evidence that Langlois "used the new-trial window" to develop other ineffective-assistance claims. Resp. Br. 49. Exactly one new-trial motion was filed in Trevino's case. That motion was signed, sworn, and served by trial counsel. JA309-313. Respondent presumes (at 13 n.1) Langlois "was involved in filing it," but trial counsel testified at the state habeas hearing that *he* decided to file the motion to "preserve any error" regarding his inability to voir dire the jury on DNA evidence. JA403-404. That hearing even addressed whether any other attorney would have been available to conduct the hearing on the motion. JA407-408. No one mentioned Langlois—a curious omission if there were any truth in the claim that



Langlois was involved with the motion. JA403-404, 406-409.<sup>3</sup>

Seeking to pad his narrative, respondent cites (at 48-49 & nn.12-13) other appeals in which Langlois raised ineffectiveness claims. Respondent highlights the case of Ricky Kerr, whom Langlois represented on appeal from a 1996 death sentence. That case is indeed instructive. In his brief in *Kerr*, Langlois wrote:

Appellant is aware of the general rule, that one should not raise an issue of ineffective assistance of counsel on direct appeal.

Appellant Br. 48, *Kerr v. State*, No. 72,261 (Tex. Crim. App. Nov. 25, 1996) (App. 4a) (“*Kerr Br.*”). Langlois accordingly raised only one ineffectiveness claim that he deemed an “exception[]” to that rule. *Id.*<sup>4</sup> In contrast, Kerr’s state habeas counsel—not bound by the 30-day deadline or the TCCA’s “general rule”—raised a

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<sup>3</sup> Trial counsel’s motion argued that he was precluded from effectively questioning the jurors on their views about DNA evidence and that the trial court erred in denying a continuance. JA309-310, 403. What respondent characterizes (at 50) as “DNA-based claims of ineffectiveness that Langlois developed during the new-trial window” reflects only *trial counsel’s* new-trial motion and Langlois’s reprise of that claim on appeal—which respondent concedes (at 14) was couched solely as trial error, not ineffective assistance.

<sup>4</sup> The claim concerned trial counsel’s handling of two pieces of evidence. Langlois cited *Vasquez v. State*, 830 S.W.2d 948, 950-951 & nn.3-4 (Tex. Crim. App. 1992), one of the rare non-death-penalty cases in which the TCCA found trial-ineffectiveness on direct review (before the 1996 habeas-reform statute) without requiring expansion of the trial record. App. 4a; see Pet. Br. 26-27. Like the other Langlois appeals respondent cites (at 48-49), Langlois’s argument in *Kerr* required no extensive extra-record investigation.

*Wiggins* claim, and the TCCA granted relief. *Ex parte Kerr*, 2009 WL 874005, at \*2 (Apr. 1, 2009).

Contrary to respondent's fictional account, Trevino could not possibly have raised his *Wiggins* claim on direct review. And his appellate counsel knew that attempting to do so would countermand the TCCA's express instruction.

## II. MARTINEZ'S RATIONALE APPLIES IN TEXAS

### A. Texas's Dual-Track System Channels Ineffectiveness Claims Into Collateral Review In Death-Penalty Cases

The rule Langlois recited in *Kerr* is one the TCCA has repeated many times. Given the limitations of the new-trial motion, the TCCA instructs that, "[a]s a general rule, [a defendant] should *not* raise an issue of ineffective assistance of counsel on direct appeal." *Mata v. State*, 226 S.W.3d 425, 430 n.14 (2007); see Pet. Br. 24-28. Even the Fifth Circuit acknowledged the TCCA's "clear" policy that habeas is "the preferred vehicle for developing ineffectiveness claims." *Ibarra v. Thaler*, 687 F.3d 222, 227 (2012).<sup>5</sup>

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<sup>5</sup> Citing two decisions, respondent claims (at 32) the TCCA finds it "proper[]" to raise trial-ineffectiveness in a new-trial motion. In *Reyes v. State*, however, the TCCA held only that Texas Rule 30(b) did not preclude such claims even though trial-ineffectiveness is not among Rule 30(b)'s enumerated grounds. 849 S.W.2d 812, 814-815 (Tex. Crim. App. 1998). *State v. Jones* noted the holding in *Reyes* and observed that defendants had attempted to raise ineffective-assistance claims in new-trial motions in several non-death-penalty cases. 2004 WL 231809, at \*7-8 (Tex. Crim. App. Jan. 18, 2004). Neither decision undermines the TCCA's consistent preference that defendants "should *not*" proceed in this manner, *Mata*, 226 S.W.3d at 430 n.14, or its recogni-

In death-penalty cases, Texas has adopted a dual-track system of review that reflects and reinforces this “general rule.” Pet. Br. 7-9, 24-34. Within that system, the direct appeal and the habeas corpus application have distinct scopes and purposes, and appellate and habeas counsel bear distinct responsibilities. Litigation of ineffective-assistance-of-trial-counsel claims falls on the habeas side.

Respondent disparages the dual-track system as “a fantasy” of Trevino’s creation. Br. 19. But Trevino is hardly alone in recognizing the difference between direct appeal and habeas review. The State Bar has recognized it. See Pet. Br. 29-30, 32-33.<sup>6</sup> The Texas Legislature has recognized it. *Id.* 29-32 & n.16; *infra* pp. 11-15. Texas death-penalty-defense lawyers recognize it. Clinics Br. 3, 11-12. Texas prosecutors recognize it. See Pet. Br. 33 n.19. And the Office of the Attorney General has recognized it. See *id.* Respondent’s contrary claims are unfounded.

1. Respondent contends (at 1, 29-30) the Texas Legislature intended to channel ineffective-assistance claims to direct appeal so they would be decided soon after sentencing, while “memories are still fresh.” It is true the Legislature wanted to accelerate the adjudication of ineffective-assistance claims. But the Legislature also understood that defendants generally challenge the “effectiveness of counsel” in “habeas actions.”

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tion that successfully doing so is “virtually impossible” in most cases, *Robinson*, 16 S.W.3d at 811.

<sup>6</sup> The Bar’s 2006 Guidelines did not prescribe new norms, but described norms and practices that were “clearly established long before 2006.” State Bar Br. 8; see *id.* 11. The Guidelines are consistent with the TCCA’s repeated statements. Respondent offers no reason not to credit them.

House Research Organization, Bill Analysis, H.B. 1562, at 1 (May 10, 1993) ("H.B. 1562 Analysis"); *see also* S.B. 440 House Floor Debate, Tape 166, Side A (May 18, 1995) (Rep. Gallego) (explaining the "very big difference ... between a direct appeal and a habeas appeal," including that the "habeas appeal" addresses whether "we provide[d] you with adequate counsel"); Pet. Br. 29-31 & n.16.

The 1995 Habeas Corpus Reform Act accordingly addressed the concern respondent highlights not by re-directing ineffectiveness claims to direct appeal, but by making the habeas proceeding "simultaneous with direct appeal." House Research Organization, *After the Death Sentence* 12-13 (Apr. 4, 1994). Accelerating litigation of the habeas application ensured that the proceeding in which the Legislature expected ineffective-assistance claims to be adjudicated—habeas corpus—would occur soon after trial. *See, e.g.*, House Comm. Criminal Jurisprudence, *Interim Report* 57 (Nov. 1994) (requiring filing of habeas petition while direct appeal is pending "allow[s] for retrials while witnesses' memories are still fresh"). The testimony respondent selectively quotes (at 29-30) thus explained that "the reason the bill was drafted so that ... habeas runs in tandem or close in time to the point of the direct appeal" was so "the litigation on habeas corpus"—which "involves primarily claims of ineffective assistance of trial counsel"—would be litigated "closer in time to the event of the trial." H.B. 1562 Hearings, H. Comm. Criminal Jurisprudence, Tape 1, Side B (Apr. 14, 1993).

2. Respondent touts (at 1) the availability of "new, conflict-free counsel" in death-penalty appeals as evidence that the Legislature meant to "empower[]" death-sentenced defendants to raise ineffective-assistance claims on direct appeal. Merely appointing



new counsel empowers nothing, however, when that new lawyer has no practicable way to develop the claim. *See supra* pp. 2-7. The Legislature did not even require that new counsel be appointed before the new-trial deadline. *See* Tex. Code Crim. Proc. art. 26.052(j); *Sprouse*, 2007 WL 283152, at \*7. Nor did it require that the trial transcript be prepared before that deadline. *See* Tex. R. App. P. 35.2, 35.3(c). If the Legislature's unstated purpose in making new counsel available was to channel ineffective-assistance claims to direct appeal instead of habeas, it could hardly have devised a less effectual means to achieve that end.

More likely, the Legislature simply recognized the other advantages of a "fresh set of eyes" on appeal. Determining which claims of error to raise and briefing and arguing those claims calls for skills and experience distinct from those required at trial. That is undoubtedly why the Legislature adopted different criteria for determining eligibility to serve as trial or appellate counsel in death-penalty cases. *Compare* Tex. Code Crim. Proc. art. 26.052(d)(2), *with id.* art. 26.052(d)(3). Nothing in the legislative history suggests the Legislature intended to redirect ineffective-assistance claims to direct appeal.<sup>7</sup>

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<sup>7</sup> Respondent cites (at 6) a hearing discussing the "difficult[y]" of raising trial-ineffectiveness without new counsel, but the cited statement (actually made during a floor debate) addressed why new counsel should be provided for "the habeas corpus appeal." H.B. 1562 House Floor Debate, Tape 186, Side B (May 10, 1993). Respondent also "presum[es]" (at 28) the Legislature enacted Article 26.052(k) in response to *Ex parte Davis*, 866 S.W.2d 234, 243 (Tex. Crim. App. 1998) (*per curiam*). But nothing in *Davis* required a response; the TCCA simply held that trial counsel had not performed ineffectively in that case. *Id.* at 242. Accordingly, respondent cites no mention of *Davis* in the legislative history.

3. Finally, respondent claims that Texas gives funding to appellate counsel for investigative expenses equivalent to the resources available to habeas counsel. That is wrong.

Respondent emphasizes (at 27, 31, 42, 44) Article 26.052(l). The portion he relies on (the second sentence) was not enacted until 1999—*after* Trevino's direct appeal. See 1999 Tex. Sess. Law Serv. ch. 837, § 2. More importantly, Article 26.052(l) limits appellate counsel's compensation to whatever funds the county makes available. See Tex. Code Crim. Proc. art. 26.052(l) (providing for compensation "from county funds"); Pet. Br. 32 n.18. Although in 1995 the Legislature considered evidence that county funding was inadequate, it left that limit in place for appeals. See *After the Death Sentence* 31; H.B. 1562 Analysis 7; Spangenberg Group, *A Study of Representation in Capital Cases in Texas* 155-158, 166 (1993). During Trevino's appeal, Bexar County capped the funding for death-penalty appeals to a range of \$1,000 to \$5,000 per case. Texas Appleseed Fair Defense Project, *The Fair Defense Report* 103 (2000). "In the great majority of cases ... direct appeal counsel was paid a fixed fee of \$1500." *Id.*

By contrast, the Legislature provided in the 1995 Act that state habeas counsel in death-penalty cases would be paid from *state* funds. 1995 Tex. Sess. Law Serv. ch. 319, § 2(h). When Trevino filed his state habeas application, the State provided up to \$25,000 per application. See 1999 Tex. Sess. Law Serv. ch. 808. The reason for this funding disparity is clear: Texas provided substantial investigative resources to the lawyer expected to investigate and present extra-record claims. See Tex. Code Crim. Proc. art. 11.071 § 3(a); House Research Organization, Bill Analysis, S.B. 440,



at 8 (May 18, 1995); S.B. 440 House Floor Debate, Tape 166, Side B (May 18, 1995). In contrast, even with funding, appellate counsel would remain impotent to develop the factual basis of an ineffective-assistance claim through a new-trial motion. *Supra* pp. 2-7. No sensible appellate counsel would waste his limited resources in that futile effort, knowing that habeas counsel was both better situated and statutorily obligated to investigate such claims.

### **B. Ineffective-Assistance Claims In Texas Death-Penalty Cases Are Routinely Adjudicated In Habeas Proceedings**

Against the foregoing, respondent resorts to a rhetorical question (at 45): “[I]f Texas lawyers are not supposed to urge ineffectiveness claims on direct appeal, why do they keep bringing them in Texas courts?” The same could have been asked in *Martinez* of the Arizona defendants who continued to raise ineffectiveness claims on direct appeal even after the Arizona Supreme Court instructed them not to. *See, e.g., State v. Espinoza*, 2010 WL 3486142 (Ariz. Ct. App. Sept. 7, 2010); *State v. Sang La*, 212 P.3d 918 (Ariz. Ct. App. 2009); *State v. Galletly*, 2009 WL 637922 (Ariz. Ct. App. Mar. 12, 2009).

A more relevant question is why, if Texas “empowers” defendants to raise ineffective-assistance on direct appeal, has the TCCA *never* granted relief on such a claim in a death-penalty case since the dual-track system was adopted? The answer cannot be that no other defendants had meritorious claims. At least 14 death-sentenced Texas defendants have prevailed on trial-ineffectiveness claims in recent years—but only in their

state or federal habeas proceedings.<sup>8</sup> That includes *every* case in which any death-sentenced Texas inmate has ever prevailed on a *Wiggins* claim.<sup>9</sup>

Actual practice thus bears out both the TCCA's "clear" preference, *Ibarra*, 687 F.3d at 227, and the channeling effects of the dual-track system. Under Texas's statutes, rules, judicial decisions, and accepted practice, counsel in death-penalty appeals are saddled with limitations of time, resources, and perspective that make it infeasible if not impossible to develop potentially meritorious ineffective-assistance claims in a new-trial motion. As a result, death-sentenced Texas defendants overwhelmingly raise those claims for the first time in state habeas, not through new-trial motions. Pet. Br. 28; 42 *Texas Practice* § 29:98. Contrary to respondent's claim (at 19), that is not because these defendants "choose[]" to forgo a readily available option, but because—as the TCCA recognizes—it is "virtually impossible" in all but "rare cases" to present ineffec-

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<sup>8</sup> See *Ex parte Lucero*, 2010 WL 3582978 (Tex. Crim. App. Sept. 15, 2010); *Adams v. Quarterman*, 824 F. App'x 340 (5th Cir. 2009); *Kerr*, 2009 WL 874005; *Walbey v. Quarterman*, 309 F. App'x 795 (5th Cir. 2009); *Ex parte Gonzales*, 204 S.W.3d 891 (Tex. Crim. App. 2006); *Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005); *Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004); *Willis v. Cockrell*, 2004 WL 1812698 (W.D. Tex. Aug. 9, 2004); *Guy v. Dretke*, 2004 WL 1462196 (N.D. Tex. June 29, 2004); *Lewis v. Dretke*, 355 F.3d 364 (5th Cir. 2008); *Beltran v. Cockrell*, 294 F.3d 730 (5th Cir. 2002); *Ex parte Varelas*, 45 S.W.3d 627 (Tex. Crim. App. 2001); *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001); *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999).

<sup>9</sup> See *Lucero*, 2010 WL 3582978, at \*1; *Adams*, 824 F. App'x at 345-352; *Kerr*, 2009 WL 874005, at \*2; *Walbey*, 309 F. App'x at 806; *Gonzales*, 204 S.W.3d at 899-400; *Willis*, 2004 WL 1812698, at \*34; *Guy*, 2004 WL 1462196, at \*1-2; *Lewis*, 355 F.3d at 369-370; *Moore*, 194 F.3d at 618-619.

tive-assistance claims in a new-trial motion. *Robinson*, 16 S.W.3d at 811, 813 n.7.

Respondent emphasizes (at 7) that some defendants “have raised and won [ineffective-assistance] claims” through new-trial motions on direct review. He cites (at 39-40) five “success stories.” All are non-death-penalty cases. As explained, the distinct procedures for non-death-penalty appeals yield different resources and incentives than in death-penalty cases. Defendants in non-death-penalty cases are not guaranteed habeas counsel or funding for that counsel to investigate extra-record claims promptly after conviction. See Tex. Code Crim. Proc. art. 11.07. They might have only one opportunity with a lawyer—appellate counsel—to challenge their convictions. It is unsurprising that non-death-sentenced defendants sometimes raise ineffectiveness claims on direct appeal—and might even win once in a while—despite the TCCA’s contrary policy.<sup>10</sup>

Respondent’s reliance on these few cases also misses a more fundamental point. Trevino does not claim there has never been and could never be an exception

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<sup>10</sup> Respondent also cites *Armstrong*—the lone case where a death-sentenced defendant tried to litigate a *Wiggins* claim through a new-trial motion. See *Armstrong v. State*, 2010 WL 859020 (Tex. Crim. App. Jan. 27, 2010). *Armstrong* confirms the impossibility of that task. Pet. Br. 43 n.21. At his hearing, Armstrong could do no more than question trial counsel about the testimony at trial, 2010 WL 859020, at \*5-6, and introduce the testimony of a mitigation specialist who suspected—“[b]ased on what little [she] could find out”—that Armstrong might be “borderline’ mentally retarded,” *id.* at \*6. With “more time,” the mitigation specialist thought she “might have found evidence of mental-health issues.” *Id.* As it was, no witnesses could “point out any additional factual information that could have been presented during the punishment phase.” *Id.*

to Texas's general rule. Exceptions exist. Pet. Br. 26-27, 43. In death-penalty cases, however, the Texas system "move[s] trial-ineffectiveness claims outside of the direct-appeal process" every bit as routinely and inexorably as Arizona's. *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012). It certainly did so in this case. As Trevino has explained (at 44-45)—and respondent nowhere disputes—this Court should look to the ordinary case, not to the extraordinary aberration. That is especially so here, where the rare exception can occur only when a death-sentenced defendant takes the *opposite* course from that dictated by TCCA policy and the structure of the dual-track system.

### C. Texas's System Implicates *Martinez's* Considerations Of Equity And Federalism

In light of the foregoing, respondent is wrong to contend that the considerations of equity and comity that were decisive in *Martinez* are not present in Texas. As in Arizona, a death-sentenced Texas defendant who waits until habeas to raise trial-ineffectiveness does precisely what the TCCA has instructed. As a rule, he has no earlier occasion to develop the claim. Developing the claim on state habeas does not disregard state procedure or prevent state courts from correcting their own errors. *See* Pet. Br. 34-36. Respondent's and his amici's policy arguments against applying *Martinez* in Texas death-penalty cases thus reduce to criticism of *Martinez* itself.

Moreover, in Texas, if the defendant's state habeas counsel unreasonably fails to develop and present the ineffective-assistance claim, the defendant faces the same risk as an Arizona defendant that "no state court at any level will hear [it]." *Martinez*, 132 S. Ct. at 1316. Were *Martinez* inapplicable, death-sentenced defend-



ants would be induced to do what the TCCA has admonished against: raise ineffective-assistance claims on direct appeal. See *Massaro v. United States*, 538 U.S. 500, 504 (2003). That result would drain already-limited resources from appellate counsel and inundate Texas courts with new-trial motions that have no hope of success. This Court has disapproved of rules that would yield such senseless results. See, e.g., *Panetti v. Quarterman*, 551 U.S. 930, 945-946 (2007).

Respondent argues (at 47-48) that applying *Martinez* in Texas is unnecessary to ensure that ineffective-assistance claims will be reviewed. He assumes that appellate counsel's failure to raise a colorable trial-ineffectiveness claim would itself constitute ineffective assistance, thereby providing cause to excuse a procedural default and permit review on federal habeas. This is illusory.

First, as respondent acknowledges (at 47 n.11), a defendant in that situation would need to exhaust any ineffective-assistance-of-appellate-counsel claim in state habeas before he could use it to establish cause to excuse his procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 450-452 (2000). Where state habeas counsel also renders ineffective assistance, the claims will still go unreviewed, unless this Court extended *Martinez* to claims of ineffective assistance of appellate counsel—a step the Court declined to take in *Martinez*, 132 S. Ct. at 1320.

Second, it is highly unlikely a court would ever find unreasonable a decision not to raise ineffective assistance on direct appeal. Given the TCCA's stated preference, the guarantee of well-funded habeas counsel, and the limited resources available to raise the other claims that must be raised on appeal, a reasonable ap-

pellate attorney in a death-penalty appeal would not pursue a futile ineffective-assistance claim. A court would also be highly unlikely to find prejudice, because the defendant would remain free to raise the claim in habeas. The State has elsewhere made precisely that argument. *See* State Br. 16, *Sprouse*, 2005 WL 3142637.

A death-sentenced Texas prisoner thus could not use appellate-counsel-ineffectiveness as cause to excuse a procedural default. *See Murray v. Carrier*, 477 U.S. 478, 488-492 (1986). That Texas defendant is instead left in the same trap as his Arizona counterpart.

### III. TREVINO'S WIGGINS CLAIM IS SUBSTANTIAL

An ineffective-assistance claim is "substantial" under *Martinez* if it "has some merit." 132 S. Ct. at 1318. Trevino's *Wiggins* claim satisfies that standard.

1. The defense at Trevino's penalty-phase trial was woefully inadequate. Pet. Br. 6, 10, 47-48. Trial counsel presented one witness, Trevino's aunt. In seven transcript pages, Trevino's aunt testified that Trevino's mother "ha[d] an alcohol problem," that Trevino "did okay" in school but dropped out for reasons she "d[id]n't know," and that Trevino's family was on welfare. JA285-287. She testified that her daughters "loved [Trevino]" and that he "got along with everybody" and was not "the type of person" who would commit capital murder. JA288, 290

The superficiality of that presentation reflected trial counsel's decision to "abandon[] their investigation of [Trevino]'s background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524; *see also, e.g., Ex parte Gonzales*, 204 S.W.3d 391, 396-397 (Tex. Crim.



App. 2006) (finding counsel's failure to inquire into defendant's social and psychological background unreasonable). Respondent claims (at 12, 51) trial counsel conducted a "thorough mitigation investigation." The sources respondent cites show the opposite. Trial counsel unreasonably limited their efforts to interview other family members and never even obtained a basic social-history report. Respondent cites the work of investigator Edward Villanueva. Br. 51 (citing JA194, 302-306). But trial counsel retained Villanueva primarily to investigate guilt-phase issues. JA194. Villanueva's time records show that in the entire year between his appointment and trial, Villanueva worked only 41 hours on Trevino's case. JA200-201, 302-303. Of those, he spent fewer than five interviewing mitigation witnesses. *Id.*

Respondent claims (at 12, 51-52) the defense "repeatedly interviewed" Trevino's family members, "diligently tried to reach Trevino's mother," and "investigated Trevino's educational background." The record does not support these assertions. Villanueva interviewed Trevino's aunt once before trial, JA200, and again just before she testified, JA303. Villanueva's records also show one interview with Trevino's stepfather. *Id.* The record does not indicate that the defense met with any other family members. Most notably, trial counsel never spoke to Trevino's mother, dismissing her as unreachable because "[s]he was from out of [the] city." JA391. At one point, however, "*she was actually in the courtroom.*" JA392 (emphasis added). Trial counsel still failed to interview her. *Id.* And neither the testimony respondent cites nor anything else in the record indicates that the defense investigated Trevino's

educational background. *See* Resp. Br. 12, 52 (citing JA277-278, 286, 392-393).<sup>11</sup>

Respondent seeks to deflect blame for this inadequate investigation by vouching (at 9-10) for the experience and skill of Trevino's counsel and asserting (at 12, 52) that Trevino "refused to provide leads" or "co-operate" in the investigation. There is no basis for the latter assertion. According to trial counsel, Trevino simply did not have "many suggestions" regarding the investigation. JA392. As for trial counsel's skill and experience, respondent fails to mention that the TCCA found both of Trevino's court-appointed attorneys constitutionally ineffective in death-penalty cases they handled around the same time as Trevino's—specifically because they failed to conduct reasonable mitigation investigations. *Kerr*, 2009 WL 874005, at \*2 (finding Gus Wilcox ineffective in 1995 capital trial); *Gonzales*, 204 S.W.3d at 399-400 (finding Mario Trevino ineffective in 1997 capital trial); *see also Kerr* Br. 2 (App. 1a) (listing trial counsel); Judgment, *State v. Gonzales*, No. 94-cr-5865A (Tex. Dist. Ct. Feb. 20, 1997) (listing trial counsel).

2. Had trial counsel conducted the investigation respondent claims occurred, the jury would have heard significant evidence that "might well have influenced [its] appraisal of [Trevino's] moral culpability." *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009) (per curiam). That evidence, as developed by federal habeas counsel,

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<sup>11</sup> Respondent also claims (at 12) trial counsel "propounded over seventy mitigation-related discovery requests." Only a few related to mitigation. JA203-222. Regardless, merely requesting that the prosecution make its constitutionally required disclosures does not satisfy counsel's obligation to perform a reasonable investigation. *See Wiggins*, 539 U.S. at 523-524.

would have established that Trevino suffered from significant prenatal exposure to alcohol; that he spent his childhood amid drinking, drug use, periods of homelessness, and violence; and that he endured physical and emotional abuse and several medical traumas as a child. *E.g.*, JA527-529, 531-532, 541-549. The jury would have learned from expert witnesses how this upbringing and the effects of fetal alcohol syndrome negatively affected Trevino's "cognitive, behavioral and emotional development," including deficits in his "ability to make appropriate decisions and choices about his lifestyle, behaviors and actions, his ability to withstand and ignore group influences, and his ability to work through and adapt to frustration and anger." JA561, 565; *see also* JA524-526, 557-566. Far from "cumulative" (Resp. Br. 53), that evidence would have presented an entirely different picture of Trevino's moral culpability.<sup>12</sup>

The district court accordingly recognized that "even the most minimal investigation into [Trevino]'s background ... would have revealed a wealth of additional mitigating evidence far more substantial than the superficial account of [Trevino]'s childhood given by [Trevino]'s lone witness during the punishment phase of trial." JA131-132. Respondent does not dispute that this assessment—as well as the district court's grant of a certificate of appealability on whether Trevino suffered a fundamental miscarriage of justice—establishes that Trevino's *Wiggins* claim warrants a remand under *Martinez*. Pet. Br. 49.

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<sup>12</sup> Nor was this evidence "inconsistent with the defense's chosen theory at trial." Resp. Br. 58. To the extent trial counsel had any "theory" in the penalty phase, it was that Trevino should not be sentenced to death.

## CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for consideration of Trevino's *Wiggins* claim under *Martinez*.

Respectfully submitted.

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FEBRUARY 2013

## **APPENDIX**

**BRIEF FOR APPELLANT,  
KERR V. STATE, NO. 72,261  
(TEX. CRIM. APP. NOV. 25, 1996)**

\* \* \*

[1]

**TO THE HONORABLE JUDGES OF THE COURT  
OF APPEALS:**

RICKY EUGENE KERR, defendant in the above numbered and styled cause and appellant before this Court was tried before a jury, wherein the Honorable Sharon MacRae, Judge, presided. Appellant herein respectfully submits his brief to this court for the purpose of appealing his conviction and sentence of death by the jury for the offense of capital murder.

For convenience, the parties will be referred to hereinafter as the "appellant" and the "state".

[2]

**NAME OF ALL PARTIES**

|                                  |                                       |
|----------------------------------|---------------------------------------|
| APPELLANT                        | RICKY EUGENE KERR                     |
| COMPLAINANTS                     | ELIZABETH McDANIEL<br>GARRY BARBIER   |
| APPELLANT'S TRIAL<br>COUNSEL     | MICHAEL GRANADOS<br>GUS WILCOX        |
| STATE'S TRIAL<br>COUNSEL         | CATHERINE BABBITT<br>TILDEN SCHAEFFER |
| APPELLANT'S COUNSEL<br>ON APPEAL | RICHARD E. LANGLOIS                   |



[46]

**POINT OF ERROR NO. 7:**

**TRIAL COUNSEL RENDERED THE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN THEY MOVED TO ENTERED INTO EVIDENCE Dx-4, A REDACTED VERSION OF VIRGINIA DANIELS STATEMENT AND WHEN TRIAL COUNSEL FAILED TO OBJECTED TO HEARSAY STATEMENTS MADE BY ELIZABETH McDANIEL TO OFFICER BELCHER RELATING TO THREATS MADE BY APPELLANT.**

**FACTUAL STATEMENT****Admission of Dx-4**

At the charge conference trial counsel moved to introduce into evidence Dx-3, Virginia Daniels statement which had been marked as Sx-44 but not admitted. After a discussion outside the presence of the jury, trial counsel argued that the statement was the best physical evidence as to how Virginia Daniels' statement was taken. The defense argued that there was a dispute as to how it was taken and how the process was done. The court found that Dx-3 was not admissible over the State's objection. (S/F:X,pp-545-48).

Defense counsel argued that the State used Virginia Daniels statement to impeach [47] her regarding the contents within the statement and therefore the jury can use the statement to determine whether they want to believe Daniels's testimony in court of her testimony in the written statement. The thrust of defense counsel's argument was to admit Daniels' written statement for the purpose allowing the jury to decide whether he written statements used to impeach her or her testimony in court was the more believable. (S/F:X,p-551)

The end result was the State and Defense agreed to the admission of Dx-4, a redacted version of Sx-44 and Dx-3. Part of the agreement was that Dx-4 would not be displayed to the jury during argument, but would be submitted to the jury during deliberations. (S/F:X:566-67).

### **Admission of threats by Appellant toward McDaniel and Barbier**

San Antonio Police Officer Brian Belcher made the call to 307 Overlook for a civil disturbance. The call had been made by Appellant to complain about the eviction notice and that the water had been turned off by the new landlords, Elizabeth McDaniel and her son Garry Barbier. Appellant was upset because McDaniel and Barbier was attempting to force him out of his rent house by turning the water off. Belcher and his partner calm each of the parties down and instructed the landlords that Appellant had a right to stay until he was evicted and that the water must be turned back on. The officers then left the location. (S/F:IX,pp-271-78)

A second call was made to the location and Belcher was asked if anything had been said at the first call that made him hope that wasn't what it was all about. Belcher responded that Ms. McDaniel reported a threat, what she perceived to be a threat. That [48] she was upset because Mr. Kerr said he would get a gun and that he had a bullet for each of them. (S/F:IX,p-279).

No objection was made by defense counsel to this hearsay evidence of a threat by made by Appellant. In fact, trial counsel instead of objecting to this inadmissible evidence, choose to elaborate upon it in his cross-examination of officer Belcher to develop that Belcher made two reports, one for the initial call for a civil dis-

turbance and one for the shooting. The first reference to the threat was "I'm going to get a gun if they don't leave." while the second reference continued the additional threat that "I've got a bullet for each of your." (S/F:IX, pp-307-12)

## ARGUMENT AND AUTHORITIES

Appellant is aware of the general rule, that one should not raise an issue of ineffective assistance of counsel on direct appeal, see *Jackson v. State*, 877 S.W.2d 768, 772 (Tex.Cr.App. 1994). However, as with every general rule there are exceptions, see *Vasquez v. State*, 830 S.W.2d 948 (Tex.Cr.App.1992).

Appellant's ineffective assistance of counsel complain is directed at his denial of the effective assistance of counsel as required under the U.S. Constitution, Texas Constitution, and the Code of Criminal Procedure. See U.S. Const. 6th and 14th Amendments; Tex. Const. Art. I, §§ 10 and 19; TEX.CODE CRIM.PROC.ANN. Arts. 1.04, 1.05, and 1.051. To show counsel was ineffective, appellant must demonstrate that his trial counsel's performance was deficient because it fell below an objective standard of reasonableness, and that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *Strickland v. [49] Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hernandez v. State*, 726 S.W.2d 53 (Tex.Crim.App. 1986); *Rodriguez v. State*, 899 S.W.2d 658, (Tex.Cr.App. 1995).

Whether the *Strickland* standard has been met is to be judged by the "totality of the representation," rather than by isolated acts or omissions of trial counsel, and the test is applied at the time of trial. *Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex.Crim.App. 1986), cert.

denied, 480 U.S. 940, 107 S.Ct. 1590, 94 L.Ed.2d 779 (1987). The burden of proving this ineffectiveness rests upon the defendant by a preponderance of the evidence. *Moore v. State*, 694 S.W.2d 528, 531 (Tex.Crim.App. 1985). Further, such allegations will only be sustained if they are firmly founded in the record. *Smith v. State*, 676 S.W.2d 379, 385 (Tex.Crim.App.1984), cert. denied, 471 U.S. 1061, 105 S.Ct. 2173, 85 L.Ed.2d 490 (1985).

A single act of deficient performance by trial counsel can constitute the ineffective assistance of counsel. In particular, the inability to understand the law to be applied to evidence or to lodge a proper objection to exclude inadmissible evidence can be unreasonable under prevailing professional norms. A failure to be aware of the proper basis for an objection cannot be considered a strategic choice made where the failure to exclude such evidence which constituted the main link to support a conviction and but for said evidence improperly admitted, the sufficiency of the conviction would be in doubt. *Ex parte Felton*, 815 S.W.2d 733, 737 (Tex.Cr.App. 1991).

An applicant must show omissions or other mistakes made by counsel that amount to professional errors of a magnitude sufficient to raise a reasonable probability [50] that the outcome of the trial would have been different but for the errors. *Butler v. State*, 716 S.W.2d 48, 54 (Tex.Cr.App. 1986) It is evident that a criminal defense lawyer must have a firm command of the facts of the case as well as governing law before he can render reasonably effective assistance of counsel. *Ex Parte Ybarra*, 629 S.W.2d 943, 946 (Tex.Cr.App. 1982); *Ex Parte Duffy*, 607 S.W.2d 507, 516 (Tex.Cr.App.1980). Counsel has a duty to bring to bear such skill and knowledge as will render the trial a "reli-



able adversarial testing process." *Strickland* @ 466 U.S. at 688, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

The key evidence the State used for conviction was oral admissions made by Appellant to Virginia Daniels in a phone conversation just after the murders. However, Daniels often testified that she did not recall Appellant making those statements. When confronted with a failure to recall oral admissions allegedly made by Appellant, the prosecutor read from Daniels statement given to police in which she included several statements allegedly made by Appellant admitting he shot McDaniel and Barbier. In effect the state solicited impeachment testimony but used the testimony as substantive evidence without objection by trial counsel or a request to limit the references within Daniels' statement for the limited purpose of impeachment. More egregious, was the move by defense counsel in having a redacted version of Daniels' written statement admitted into evidence as Dx-4. That redacted statement included the oral admissions of Appellant.

Proper objections made upon a through knowledge of the rules of evidence would have eliminated from the jury's consideration the oral admissions of Appellant as [51] contained within Daniel's written statement. Testimony admitted only for impeachment purposes is without probative value and cannot be considered as substantive evidence. *Key v. State*, 492 S.W.2d 514, 516 (Tex.Crim.App.1973). One of the common methods of impeachment is by the use of prior inconsistent statements, oral or written, under oath or not. *Miranda v. State*, 813 S.W.2d 724, 735 (Tex.App.—San Antonio 1991, pet. ref'd).

The jury may consider the inconsistency as damaging to the witness's credibility, but may not use the ev-

idence substantively. *Jernigan v. State*, 589 S.W.2d 681, 692 (Tex.Crim.App. [Panel Op.] 1979); *Smith v. State*, 520 S.W.2d 383, 386 (Tex.Crim.App. 1975).

It is obvious that trial counsel did not understand that impeachment evidence could not be used as substantive evidence. In particular, defense argued long and hard before the court that the purpose of admitting Dx-4 was to allow the jury to decide under what circumstances Daniels statement was given and for the jury to determine what version was credible, her trial testimony or her written statement. (S/F:X,pp-545-567) In effect what trial counsel did was to allow the jury to consider the oral admissions of Appellant as substantive evidence. Eliciting inadmissible oral statements of a defendant cannot be considered as trial strategy, see *Monies v. State*, 824 S.W.2d 308 (Tex.App.-San Antonio 1992, no pet.)

Rule 607, permitting a party to impeach its own witness, does not permit a party to call a witness primarily for the purpose of impeaching the proposed witness, with evidence that would be otherwise inadmissible. *Zule v. State*, 802 S.W.2d 28, 34 (Tex.App.-Corpus Christi 1990, pet. ref'd). "When counsel knows that a witness has [52] nothing favorable to say, counsel should not be permitted to parade inconsistent statements before the jury in the hope that they will be treated as substantive evidence." HULEN WENDORF, DAVID SCHLUETER & ROBERT R. BARTON, TEXAS RULES OF EVIDENCE MANUAL, Crim. 607 at VI-37 (3d ed. 1991). Normally, when testimony is offered and admitted for impeachment purposes only, it should be limited in the court's charge. *Thurman v. State*, 382 S.W.2d 492, 493. However, trial counsel did not make a diligent effort to exclude the impeachment evidence from consideration by the jury.



One meager objection was lodged. (S/F:VIII, p-213) And trial counsel made no effort to require the Court to include a limiting instruction within the jury charge regarding the use of impeachment evidence.

Trial counsel also failed to object to officer Belcher's testimony regarding a conversation with McDaniel in which she told him that Appellant had made a threat to her on the day of the shootings. (S/F:VIII,p-279) Rather than exclude the inadmissible testimony, defense counsel chose to question Belcher about the statement and how he reported it within his two reports. (S/F:VIII,pp-307-15) Instead of excluding the testimony of threats by Appellant, trial counsel carefully detailed the contents of the threats before the jury over and over again.

The testimony of Appellant's threat to McDaniel as conveyed by McDaniel to officer Belcher was inadmissible. see *Owens v. State*, 916 S.W.2d 713 (Tex.App.-Waco 1996, no pet). The fact that the State did not have any eye witnesses to the shooting of McDaniel and her son necessitated that defense counsel be knowledgeable to the rule of evidence. When trial counsel failed to limit the admission of impeachment evidence [58] and evidence of recent threats, trial counsel failed to render the effective assistance of counsel.

Counsels' representation fell below an objective standard of reasonableness." *Strickland*, @ 466 U.S. at 688, 104 S.Ct. at 2065, 80 L.Ed.2d at 693. Additionally, because of counsels' failure to limited the use of prejudicial evidence and their failure object to damaging testimony, the evidence is "sufficient to undermine confidence in the outcome" of the appellant's trial. *Strickland*, @ 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. Therefore, this Court should hold that the perfor-

mance of counsels failed to meet the standard of reasonably effective assistance of counsel established by the Supreme Court in *Strickland v. Washington*, supra. See *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex.Cr.App. 1986) (adopting the *Strickland* standard). The errors in this case are comparable to those found rendering the ineffective assistance of counsel in *Ex parte Welborn*, 785 S.W.2d 391, (Tex.Cr.App. 1990).

\* \* \*

**AMICUS  
CURIAE  
BRIEF**

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No. 11-10189

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IN THE  
Supreme Court of the United States

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CARLOS TREVINO,

*Petitioner,*

*vs.*

RICK THALER, Director, Texas Department of  
Criminal Justice, Correctional Institutions Division,  
*Respondent.*

---

On Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit

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**BRIEF AMICUS CURIAE OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF RESPONDENT**

---

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## QUESTION PRESENTED

Under the rule of *Coleman v. Thompson*, in force for over two decades, ineffective assistance of state collateral counsel is not "cause" for a default, allowing a claim defaulted in state court to be heard on the merits on federal habeas. In *Martinez v. Ryan*, this Court created an exception it described as "narrow" for states that bar all ineffectiveness claims from direct appeal.

The question in this case is whether the narrow exception in *Martinez* should be expanded to overrule *Coleman* in its primary area of operation in most states.





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IN THE  
**Supreme Court of the United States**

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CARLOS TREVINO,

*Petitioner,*

vs.

RICK THALER, Director, Texas Department of  
Criminal Justice, Correctional Institutions Division,  
*Respondent.*

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**BRIEF AMICUS CURIAE OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF RESPONDENT**

---

**INTEREST OF AMICUS CURIAE**

The Criminal Justice Legal Foundation (CJLF)<sup>1</sup> is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

- 
1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

This case involves one of the most important protections for the finality of criminal judgments established by this Court. Rather than allowing an endless chain of petitions with each lawyer attacking the competency of the one before as “good cause” for not raising the claim earlier, the rule of *Coleman v. Thompson* cuts off such “ineffectiveness as cause” claims at the conclusion of the first appeal. This protection is essential if the victims’ right to proceedings free from unreasonable delay, see 18 U. S. C. § 3771, subds. (a)(7), (b)(2)(A), is ever to become a reality. Although the Court recognized two *narrow* exceptions to this rule in the last term, the petitioner’s claim in the present case threatens to make an “exception” that swallows the rule.

If petitioner’s proposal is adopted, federal habeas petitions asserting ineffectiveness claims never raised in state court and claiming ineffectiveness of state collateral counsel as cause will be routine, requiring fact-intensive litigation to decide even when the claims are meritless, as the vast majority of habeas claims are. This drastic change in the long-established law governing federal habeas corpus would be severely detrimental to the rights of victims that CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

Petitioner Carlos Trevino and his cohorts committed a crime of unspeakable savagery. They abducted, raped, sodomized, and stabbed to death Linda Salinas, just 15. See *Trevino v. Thaler*, 678 F. Supp. 2d 445, 449-451 (WD Tex. 2009), J. A. 29-34. Any claim that Trevino was anything other than a major participant in this atrocity is negated by a DNA test of a blood stain on Linda’s underwear. Although not a conclusive match to Trevino, it excludes everyone else involved in the crime.

See *id.*, at 452, J. A. 35; *Trevino v. Thaler*, 449 Fed. Appx. 415, 418, n. 1 (CA5 2011), J. A. 137.

Following the trial, newly appointed direct-appeal counsel made a motion for a new trial in the trial court, including an allegation of ineffective assistance. See Brief for Respondent 13. The Texas Court of Criminal Appeals affirmed on direct appeal. *Trevino v. State*, 991 S. W. 2d 849 (1999). Concurrently, Trevino collaterally attacked the judgment in a state habeas corpus proceeding, in which he was represented by counsel and received an evidentiary hearing. Yet another attorney had been appointed for this proceeding, see Brief for Respondent 15, and he made claims of ineffective assistance at both the guilt and penalty phases. See J. A. 321-349. The trial judge recommended denial of this petition, and the Court of Criminal Appeals adopted the recommendation. J. A. 25-26.

Trevino filed a federal habeas corpus petition, which was stayed while he pursued a second state habeas petition. This petition included a claim that trial counsel had been ineffective in the penalty phase for not finding and introducing supposedly mitigating evidence regarding Trevino's childhood having no demonstrable connection to the crime. The Texas Court of Criminal Appeals denied the second petition under the state's successive petition rule. J. A. 27-28. After yet more back-and-forth, the federal court finally lifted the stay and proceeded with the case six years after it was filed. See J. A. 41-42.

On the issue of ineffective assistance of trial counsel, the District Court found the claim procedurally defaulted, straightforwardly applying the well-established rule that ineffective assistance of state collateral counsel is not considered "cause" for a default. J. A. 69-70. The court also found that there had been no miscarriage of justice because the new, supposedly

mitigating evidence<sup>2</sup> had no effect on Trevino's guilt of the offense or eligibility for the penalty. J. A. 71.

Despite the default, the District Court went on to hold in the alternative that Trevino's claim would fail on the merits. The horrific crime and Trevino's complete lack of remorse are such strong aggravating circumstances that there is no reasonable possibility that the new, weak mitigating evidence would have changed the result. J. A. 78.

The Court of Appeals denied a certificate of appealability on this claim. "Reasonable jurists cannot disagree with the district court's procedural ruling in this regard." J. A. 156.

## SUMMARY OF ARGUMENT

This case could be decided on grounds specific to the system of review in Texas, for the reasons explained in the Brief for Respondent. Alternatively, it can be decided simply by reaffirming what the Court said in *Martinez v. Ryan*, that *Coleman v. Thompson* remains the law with only a *narrow* exception for states that choose to *bar* ineffective assistance claims from direct appeal.

The rule of *Coleman v. Thompson* is a long-established precedent that is part of a line of decisions designed to give greater finality to the state court process and reduce federal intrusion. Petitioner is not asking for a narrow exception like the ones created in *Maples v. Thomas* and *Martinez v. Ryan*. He asks the Court to take general language from *Martinez* and

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2. The court also characterized the evidence as "double-edged." J. A. 71, 75-76. A history of crime and gang membership is not mitigating in most people's eyes.



expand it into an exception so large that it overrules the *Coleman* rule in its primary area of operation. He asks for an exception that swallows the rule.

While Congress did not codify *Coleman* in AEDPA, that rule was a clearly understood aspect of habeas jurisprudence at the time, and overruling it would severely undercut essential reforms that Congress did enact. The critically important reform of § 2254(d) depends for its efficacy on a procedural default rule that requires claims to be raised first to the state courts. The factual development default rule, § 2254(e)(2), is partially a codification of a precedent of this Court, *Keeney v. Tamayo-Reyes*, a precedent that explicitly stated that *Coleman* precluded the use of ineffective assistance of state collateral counsel to establish cause for such a default.

Adoption of petitioner's proposed rule would create a powerful incentive to sandbag. Federal court is perceived to be a more favorable forum for capital petitioners than state court in many states. If petitioners with ineffective state collateral counsel get review of their claims from scratch in federal court, while those with effective state attorneys get review subject to § 2254(d), there will be enormous pressure to be ineffective on purpose.

There can be little doubt that the capital defense bar would exploit its new tool to the maximum, alleging in nearly every case that state collateral counsel was ineffective merely for omitting a claim that federal habeas counsel wants to bring. We have already seen this in California, where the *Coleman* rule is not followed in state courts, and it has been a disaster. Expanding this rule nationwide would add a permanent additional layer of litigation to a system that already has too many layers, contrary to the core purpose of AEDPA to achieve an effective death penalty.



Congress has already addressed the problem of inadequate counsel on state collateral review in Chapter 154 of Title 28. The correct role for the judiciary is to stop the foot-dragging and implement Congress's duly legislated solution.

## ARGUMENT

The State of Texas has argued persuasively for a judgment in its favor based on factors unique to that State, the reforms enacted by its legislature. See Brief for Respondent 21-48. A decision on that basis would resolve this case and other Texas cases, but it would leave unresolved the status of cases in the many jurisdictions that have neither a procedure like Texas's nor a bar against raising ineffectiveness claims on direct appeal like the one at issue in *Martinez v. Ryan*, 566 U. S. \_\_\_, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

*Amicus* CJLF therefore suggests an alternate basis of decision. That is simply to reaffirm the assurances this Court gave in *Martinez*, namely: (1) that the exception to the *Coleman*<sup>3</sup> rule created in that case is *narrow*; (2) that it is triggered by a State's decision to *bar* ineffectiveness claims from direct appeal; and (3) that *Coleman* remains the law in all other circumstances.

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3. *Coleman v. Thompson*, 501 U.S. 722, 752-753 (1991)

**I. Petitioner is asking for the *de facto*  
overruling of the long-established  
*Coleman* rule.**

**A. A Rule and Two Narrow Exceptions.**

The rule that ineffective assistance of counsel is not “cause” for a procedural default if it occurs in a proceeding where there is no constitutional right to counsel is a vitally important one in protecting the States’ interest in finality against a chain of petitions where each one claims ineffectiveness of counsel in the one before as a reason to reopen the case. “[I]n the context of procedural default, [this Court has] previously stated, *without qualification*, that a petitioner must bear the risk of attorney error.” *Holland v. Florida*, 560 U. S. \_\_\_, 130 S. Ct. 2549, 2563, 177 L. Ed. 2d 130, 146 (2010) (quoting *Coleman v. Thompson*, 501 U. S. 722, 752-753 (1991)) (emphasis added) (internal quotation marks omitted).

The “without qualification” portion of this statement is no longer true. Last term, the Court made two narrow exceptions in the rule. In *Maples v. Thomas*, 565 U. S. \_\_\_, 132 S. Ct. 912, 922, 181 L. Ed. 2d 807, 821 (2012), the Court reiterated the unequivocal *Coleman* rule for negligence of postconviction counsel but then held that the situation was “markedly different,” *ibid.*, for complete abandonment by the attorney. This exception is narrow because actual abandonment is an extreme and rarely occurring event.<sup>4</sup> The *Maples*

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4. Predictably but regrettably, since *Maples* capital habeas counsel have tried to shoehorn ordinary negligence claims into “abandonment.” See, e.g., *Moormann v. Schriro*, 672 F. 3d 644, 647-648 (CA9 2012). Although these attempts have been unsuccessful, they have caused expense and delay, the inevitable consequence of every new wrinkle in this already too-complex area of law.

Court's characterization of the facts of that case as "uncommon," *ibid.*, is an understatement.

In *Martinez v. Ryan*, 566 U. S. \_\_\_, 132 S. Ct. 1309, 1315, 182 L. Ed. 2d 272, 282 (2012), the Court explicitly stated that the exception created was narrow: "This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Although the Court's explanation of what constitutes an "initial-review collateral proceeding" is less than clear, the Court's characterization of the exception as "narrow" precludes any interpretation that would encompass all or most first state collateral review proceedings nationwide. Far from being a "narrow" exception, that would be an exception that swallows the rule.

*Martinez* clearly stated that its exception was based on "Arizona's decision to *bar* defendants from raising ineffective-assistance claims on direct appeal." 132 S. Ct., at 1320, 182 L. Ed. 2d, at 288 (emphasis added). This is narrow because it applies to few states, and those few can readily avoid it by reversing that decision. An exception that applies to states where collateral review is typically the first occasion to raise an ineffectiveness claim as a *practical matter* would apply to most states, given the way review of criminal cases is presently structured in most jurisdictions, because most ineffective assistance claims require facts outside the appellate record. See, e.g., *Massaro v. United States*, 538 U. S. 500, 504-505 (2003). The *Martinez* Court stated that its exception did not extend to such cases. "It does not extend to attorney errors in any proceeding beyond the first occasion the State *allows* a prisoner to raise a claim of ineffective assistance at trial, *even though that initial-review collateral proceeding may be*

*deficient for other reasons.*" 132 S. Ct., at 1320, 182 L. Ed. 2d, at 288 (emphasis added). This is consistent with the statement that, "The rule of *Coleman* governs in all but the limited circumstances recognized here." *Ibid.* An "exception" to *Coleman* that extended to cases where bringing the claim on direct review was merely impractical, as opposed to forbidden, would abrogate the *Coleman* rule in its *primary* area of operation. The "exception" would be the primary rule, and the tattered remnants of *Coleman* would be the exception.

### *B. Development of the Rule.*

In this subpart, we will trace the development of the *Coleman* rule. In the subsequent parts of this brief, we will show how a *de facto* overruling of *Coleman* would subvert the operation and defeat the purpose of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), even if it would not be directly contrary to its wording.

The procedural default doctrine began as an aspect of the exhaustion rule. In *Brown v. Allen*, 344 U. S. 443 (1953), the Court held that the petitioner must have exhausted state remedies, and the expiration of the time to do so did not meet or excuse the requirement, so habeas relief was barred. See *id.*, at 487. However, a precursor of the "cause" exception was present from the beginning, as the Court noted that relief would be available if the default was "because of lack of counsel, incapacity, or some interference by officials." *Id.*, at 485-486. This aspect of *Brown* was effectively overruled in *Fay v. Noia*, 372 U. S. 391, 438 (1963), when the Court threw open the doors to habeas relief for defaulted claims unless the petitioner "has deliberately by-passed the orderly procedure of the state courts . . . ."

*Noia* itself was undermined in a series of decisions in the mid-1970s, culminating in *Wainwright v. Sykes*, 433 U. S. 72, 87 (1977), which adopted the cause and prejudice test as a general rule, rejecting “the sweeping language of *Fay v. Noia*.” The *Sykes* rule was applied to a claim omitted from an appeal in *Murray v. Carrier*, 477 U. S. 478 (1986). Such an omission can be “cause” if it is “constitutionally ineffective,” if the claim “was not reasonably available to counsel,” or if there is interference by the state. See *id.*, at 488. Mere “ignorance or inadvertence” is not sufficient. See *id.*, at 491.<sup>5</sup> Recognizing that the latter rule could produce harsh results, *Carrier* explicitly recognized actual innocence as a free-standing exception to the procedural default rule. See *id.*, at 495-496.

The *Sykes* rule was applied to an attorney’s negligent missing of an appeal deadline in state collateral review in *Coleman v. Thompson*, *supra*. Following denial of the habeas petition on the merits by the trial court, Coleman’s lawyers appealed three days late. See *Coleman v. Thompson*, 501 U. S. 722, 727 (1991). Regarding Coleman’s claim of attorney negligence as cause, the Court clearly conditioned such a claim on a constitutional right to effective counsel in the proceeding at issue.

“Applying the *Carrier* rule as stated, this case is at an end. There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania v. Finley*, 481 U. S. 551 (1987); *Mur-*

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5. A perfectly valid reason for omitting a claim is that the “process of ‘winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U. S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U. S. 745, 751-752 (1983)). This is as true in capital cases, which *Smith* was, as in noncapital ones.



*ray v. Giarratano*, 492 U. S. 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. See *Wainwright v. Torna*, 455 U. S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must 'bear the risk of attorney error that results in a procedural default.' " 501 U. S., at 752-753.

The *Coleman* Court unequivocally limited attorney error as "cause" to those proceedings in which there is a constitutional right to counsel.

"Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the petitioner, it is the petitioner who must bear the burden of a failure to follow state procedural rules. *In the absence of a constitutional violation*, the petitioner bears the risk in federal habeas for *all* attorney errors made in the course of the representation, as *Carrier* says explicitly." *Id.*, at 754 (emphasis added).

The logic of *Coleman* can be stated as a syllogism. The first premise is that ineffective assistance can be "cause" only when it violates a constitutional right to



counsel, the *Carrier* rule. See *ibid.* The second premise is that there is no constitutional right to counsel in state collateral review, the rule of *Pennsylvania v. Finley*, 481 U. S. 551, 556 (1987), and *Murray v. Giarrratano*, 492 U. S. 1, 10 (1989). Therefore, ineffective assistance of state collateral counsel is not “cause.” The possible exception that *Coleman* pondered and left open was not whether there might be an exception to *Carrier* for the first opportunity to raise an ineffective assistance claim but whether there might be an exception to *Finley* and *Giarrratano* in that circumstance. See *Coleman*, 501 U. S., at 755. The fact that *Coleman* did not resolve the question of whether to make an exception to that rule does not matter as far as the strength of precedent goes because *Finley* and *Giarrratano* had made the rule without exceptions.

The very next term brought to the Court a case of attorney default in the initial state collateral review. In *Keeney v. Tamayo-Reyes*, 504 U. S. 1, 3 (1992), the underlying claim involved “a plea hearing, at which petitioner was represented by counsel and his interpreter.” On state collateral review, he attacked the voluntariness of the plea on the basis that the interpreter had not accurately and completely translated, a claim rejected by the state court as factually unfounded. See *id.*, at 3-4. On federal habeas, he claimed the facts had not been adequately developed in the state-court hearing. *Id.*, at 4. Citing *Coleman*, the Court held that this kind of fact default would be governed by the same cause-and-prejudice standard as claim defaults. See *id.*, at 7-8. The case was remanded for determination of cause and prejudice. See *id.*, at 12.

In dissent, the author of *Coleman* had no doubt what that precedent required regarding the cause determination. “Where, as in this case, the state factfinding occurs at a postconviction proceeding, the petitioner has

no constitutional right to the effective assistance of counsel, so counsel's poor performance can *never* constitute 'cause' under the cause and prejudice standard. *Coleman v. Thompson*, 501 U. S., at 752." *Id.*, at 22 (opinion of O'Connor, J.) (emphasis in original).

In a responsive footnote, the Court agreed with this assessment.

"We agree with Justice O'Connor that under our holding a claim invoking the fifth circumstance of *Townsend* will be unavailing where the cause asserted is attorney error. *Murray v. Carrier*, 477 U. S. 478 (1986), and *Coleman v. Thompson*, 501 U. S. 722 (1991), dictate as much. *Such was the intended effect of those cases*, but this does not make that circumstance a dead letter, for cause may be shown *for reasons other than attorney error*." *Id.*, at 11, n. 5 (emphasis added).

Although narrowly divided on the main holding, the Court unanimously understood that *Coleman* completely barred the use of ineffective assistance of counsel at the initial collateral review as "cause" under a *Sykes* analysis. That was this Court's last word on the subject when Congress enacted AEDPA. See *infra*, at 15-21.

The *Martinez v. Ryan* opinion notes, "in the 20 years since *Coleman* was decided, we have not held *Coleman* applies in circumstances like this one." 132 S. Ct., at 1319, 182 L. Ed. 2d, at 287. That statement is true only if the "circumstances like this one" are narrowly circumscribed. It is definitely not true if the "circumstances" are expanded to include any attorney default at a state collateral proceeding which is the first proceeding where the particular type of claim could be brought as a practical matter. That is, precisely, *Keeney v. Tamayo-Reyes*, where the Court left no doubt as to

*Coleman's* application. Although that case was not strictly an ineffective assistance claim, it was a claim based on deficient performance of the defense team, a claim the defendant cannot be expected to make from the trial record for the same reason he cannot make an ineffective assistance claim from that record. Further, courts of appeals nationwide applied *Coleman* to ineffective assistance of counsel claims defaulted in the initial state collateral proceeding. See, e.g., *Ortiz v. Stewart*, 149 F. 3d 923, 932 (CA9 1998); *Abdus-Samad v. Bell*, 420 F. 3d 614, 631-632 (CA6 2005); *Smallwood v. Gibson*, 191 F. 3d 1257, 1269 (CA10 1999). Even the most partisan, pro-petitioner, anti-death-penalty commentators acknowledged that *Coleman* simply precluded ineffectiveness of collateral counsel as cause, at least in the absence of a severance of the "agency" relationship. See 2 J. Liebman & R. Hertz, *Federal Habeas Corpus Practice and Procedure* § 26.3b, pp. 860-863 (2d ed. 1994) (edition available when Congress enacted AEDPA); Steiker, *Improving Representation in Capital Cases: Establishing the Right Baselines in Federal Habeas to Promote Structural Reform Within States*, 34 *Am. J. Crim. L.* 293, 307, n. 68 (2007).

The state is already burdened with the uniquely difficult task of defending two of its former adversaries, the trial attorney and the appellate attorney. To add a burden of defending the performance of state habeas counsel as well would further bog down a system of review that is already far too cumbersome. A simple rule keeping the entire issue of the effectiveness of state habeas counsel out of the federal court is of great value in furthering AEDPA's goal of reducing delay. See *Ryan v. Gonzales*, 568 U. S. \_\_ (No. 10-930, Jan. 8, 2013) (slip op., at 17) (purpose of AEDPA). That is the rule Congress believed was in force when it enacted AEDPA, and while Congress did not codify that rule, it

enacted other provisions that depend on it for their efficacy.

**II. Petitioner's proposed rule would provide a route to evade the central reform of AEDPA, create a conflict with § 2254(e)(2), and create a powerful incentive to sandbag.**

*A. Evading the Central Reform.*

Of all the habeas reforms enacted in the Antiterrorism and Effective Death Penalty Act of 1996, the most controversial by far was 28 U. S. C. § 2254(d), ending the 43-year reign of *de novo* review of state court decisions by lower federal courts. See generally Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998). Evading this reform is the Holy Grail for those who wish to grind capital punishment to a halt. The rule proposed in the present case would provide the route to do just that. Further, evaluation of an ineffectiveness claim necessarily involves an evaluation of the strength of the underlying claims<sup>6</sup> not brought in state court, *Martinez v. Ryan*, 566 U. S. \_\_\_, 132 S. Ct. 1309, 1318-1319, 182 L. Ed. 2d 272, 286 (2012), and therefore not decided on the merits there.

The state will not necessarily prevail in its defense of state habeas counsel's performance even if that

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6. This Court has not yet resolved the important question of whether ineffective assistance is one claim, as *amicus* CJLF believes it is, see Brief *Amicus Curiae* for Criminal Justice Legal Foundation in *Bell v. Kelly*, No. 07-1223, pp. 13-23, or multiple claims for the various alleged failings of defense counsel. See *Cullen v. Pinholster*, 563 U. S. \_\_\_, n. 10, 131 S. Ct. 1388, 1401, n. 10, 179 L. Ed. 2d 557, 573, n. 10 (2011) (not resolved).



performance was more than adequate. The rule of *Strickland v. Washington*, 466 U. S. 668, 687-689 (1984), is so vague and its application so case-specific that different judges can come to very different conclusions. More than once, we have seen a state court reject a *Strickland* claim, a federal court of appeals declare that decision “unreasonable,” and this Court reverse the latter determination, reinstating the state court decision. See *Woodford v. Visciotti*, 537 U. S. 19, 26-27 (2002) (*per curiam*); *Holland v. Jackson*, 542 U. S. 649, 655 (2004) (*per curiam*). A similarly wide range of disagreement is likely if the question of effectiveness of state habeas counsel is opened up for litigation. *Wong v. Belmontes*, 558 U. S. 15 (2009) (*per curiam*), a pre-AEDPA case, illustrates how very seriously wrong some federal courts can go on ineffective assistance claims in capital cases if freed from the restraints of § 2254(d).<sup>7</sup>

Even on the question of what “professional norms” are, we can expect a wide range of disagreement, and therefore erroneous findings of ineffectiveness. If an attorney examines the potential claims, winnows out the weak ones, and concentrates on the strong ones, some courts would rule that counsel had acted in exemplary fashion, citing on-point precedents of this Court. See *supra*, at 10, n. 5; see also *In re Reno*, 55 Cal. 4th 428, 466, 283 P. 3d 1181, 1212 (2012). Another court might rule that counsel had violated “professional norms” because a drastically different standard is set out in commentary accompanying a “guideline,” which

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7. *Belmontes* also illustrates that the state cannot protect itself from ineffectiveness claims by appointing a highly respected attorney for the defendant. See Smith, Stockton Attorney, Professor Praised by Students, Peers, Stockton Record (Dec. 8, 2011) <[http://www.recordnet.com/apps/pbcs.dll/article?AID=/20111208/A\\_NEWS/112080315](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20111208/A_NEWS/112080315)>.

says counsel should raise all conceivable claims. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.8 (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1030; cf. *Reno, supra*, at 467-468, 283 P. 3d, at 1213. Justice Alito has explained why reliance on a guideline issued by a private organization is inappropriate for establishing constitutional minimums. See *Bobby v. Van Hook*, 558 U. S. 4 (2009) (concurring opinion). This is particularly true when the issuing organization has a long and notorious history of taking the defense side against the prosecution as a matter of course. See Scheidegger, ABA Briefs in the 1997-98 Supreme Court Term, 2 Crim. L. News No. 3, p. 12 (Winter 1998).<sup>8</sup> Even so, a petitioner might undeservedly prevail on this basis.

An ineffectiveness claim may depend on facts entirely within the prior defense attorney's knowledge, such as whether a decision not to raise a claim was an informed, strategic choice. See *Strickland v. Washington*, 446 U. S., at 690-691 (virtually unchallengable). The state's ability to defend against an ineffectiveness claim that is, in reality, meritless may well depend on the willingness of the prior attorney to cooperate with the state. See Newmark, The Lawyer's "Prisoner's Dilemma": Duty and Self-Defense in Postconviction Ineffectiveness Claims, 79 Fordham L. Rev. 699, 700-701 (2010). It would be unrealistic to expect that cooperation will always, or even usually, be forthcoming. See, e.g., *id.*, at 702 (concluding "trial counsel should not assist the prosecution by defending against ineffectiveness allegations outside of court").

If state habeas counsel is found ineffective for not raising a claim, correctly or not, and if the state has a

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8. Available at <http://www.fed-soc.org/publications/detail/aba-briefs-in-the-1997-98-supreme-court-term>.



successive petition rule similar in strictness to the federal rule, then under petitioner's proposal the federal habeas court would proceed to decide from scratch the merits of a claim that was never presented to state court, deftly dancing around § 2254(d). Such a result may not be contrary to any specific language in AEDPA, but it is contrary to the core purpose and unmistakable intent of the enactment as a whole.

As this Court noted in *Pinholster*, 131 S. Ct., at 1398-1399, 179 L. Ed. 2d, at 570:

“ ‘[T]he broader context of the statute as a whole,’ . . . demonstrates Congress’ intent to channel prisoners’ claims first to the state courts. [Citation.] ‘The federal habeas scheme leaves primary responsibility with the state courts . . . .’ [Woodford v.] Visciotti, [537 U. S. 19,] 27 [(2002) (*per curiam*)] Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*.”

#### *B. Conflict With § 2254(e)(2).*

If a federal habeas court proceeds to decide a case under petitioner's proposed rule, how is it to decide that case? By hypothesis, the state is one where (as in most states) ineffectiveness claims are allowed on direct review by law, but as a practical matter claims requiring evidence outside the record need to be made on collateral review. Also, by hypothesis, state habeas counsel could have found the evidence if he had been diligent, since otherwise he would not be ineffective. Further, the applicant has “failed to develop the factual basis of [the] claim” within the meaning of the statute. *Wil-*

*Williams v. Taylor*, 529 U. S. 420, 432 (2000), held that “failed” means a lack of diligence or greater fault on the part of the prisoner or counsel.<sup>9</sup> *Williams* also held “prisoners who would have had to satisfy *Keeney*’s<sup>10</sup> test for excusing deficiency in the state-court record prior to AEDPA are now controlled by §2254(e)(2).” *Id.*, at 434. As *Keeney* indicated, that includes prisoners whose state collateral counsel were ineffective. See *supra*, at 13.

When Congress enacted § 2254(e)(2), it partly codified *Keeney*, see *Williams v. Taylor*, 529 U. S., at 432-433, but it also tightened up the circumstances that will be considered sufficient cause for defaulting the presentation of facts to the state court. The retroactive new rule ground, § 2254(e)(2)(A)(i), is not relevant here. The alternate requirement in § 2254(e)(2)(A)(ii) is “a factual predicate that could not have been previously discovered through the exercise of due diligence . . . .” That form of cause is necessarily *not* met when counsel has failed the effectiveness standard. It is not ineffective to fail to find what cannot reasonably be found. See *Strickland*, 466 U. S., at 691 (“duty to make reasonable investigations”).

In addition, new evidence that is relevant only to the penalty determination can never be a ground for an evidentiary hearing under § 2254(e)(2) regardless of whether it was previously available. In addition to the two requirements discussed above, Congress added a conjunctive requirement that the evidence establish the petitioner’s innocence “of the underlying offense.” By

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9. “Failure” may also include a deliberate decision not to raise a claim, see *Murray v. Carrier*, 477 U. S. 478, 491 (1991), which may be an entirely competent decision. See *Smith v. Murray*, 477 U. S. 527, 536 (1991).

10. *Keeney v. Tamayo-Reyes*, 504 U. S. 1 (1992)

specifying the underlying offense and not the penalty determination, Congress determined that the penalty phase decision for a guilty murderer does not involve the same potential for a miscarriage of justice as the conviction of an innocent person, cf. *Schlup v. Delo*, 513 U. S. 298, 325-326 (1995), and therefore does not warrant bending the procedural rules.

To get to an evidentiary hearing in a case such as the present one, a federal habeas court would have to run roughshod over § 2254(e)(2). Conversely, that section, properly applied, would preclude the receipt of new evidence in virtually every case to which petitioner's proposed rule would apply. Subdivisions (d) and (e)(2) are designed to work in tandem to minimize the amount of factual adjudication in federal habeas. See *Pinholster*, 131 S. Ct., at 1401, 179 L. Ed. 2d, at 572-573. This design must not be undermined.

### C. Sandbagging.

Yet the potential consequences get even worse. If the federal court is perceived as a forum more likely to grant relief or likely to delay longer, as it is in many jurisdictions, and if getting deference-free review there is seen as strongly in the petitioner's favor, state habeas counsel may feel pressure to intentionally withhold known claims in order to open the gate to the new bypass route around § 2254(d) and *Pinholster*.

Intentional withholding of claims is no idle speculation. In one of the most dramatic cases in modern capital punishment history, this Court was faced with a slew of last-minute habeas petitions challenging execution by cyanide gas, the effects of which had been known for many years. "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the

judicial process.” *Gomez v. United States Dist. Court*, 503 U. S. 653, 654 (1992) (*per curiam*); see also *Sawyer v. Whitley*, 505 U. S. 333, 341, n. 7 (1992). At several points in the development of the law of procedural default and successive petitions, the Court has noted the importance of discouraging sandbagging as a reason for these rules. “[H]abeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh.” *McCleskey v. Zant*, 499 U. S. 467, 491-492 (1991); see also *Murray v. Carrier*, 477 U. S., at 490-491. Now the Court is being asked to create an incentive to sandbag greater than any of those it has previously closed off. The Court should decline the invitation.

**III. Opening up a permanent additional issue to be litigated in nearly every capital case would further obstruct the principal purpose of AEDPA—achieving an effective death penalty.**

The basic plan that Congress had in mind, as set forth in the Powell Committee Report, is that capital cases should have a single, full round of review through the state and federal courts. That means a direct appeal, one state habeas petition, and one federal habeas petition. See *infra*, at 27. If the state has a reasonably strict successive petition rule,<sup>11</sup> then in most cases all federal claims would be either resolved on the merits or procedurally defaulted at the conclusion of the two state procedures. If an issue is decided on the merits in state court, then it is reviewed only for reasonableness by the federal court, and that review is

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11. Such as the rule for successive petitions for federal defendants, 28 U. S. C. § 2255(h).

supposed to be done entirely on the state court record. See *Cullen v. Pinholster*, 563 U. S. \_\_\_, 131 S. Ct. 1388, 1400, 179 L. Ed. 2d, 557, 572 (2011). There is no need for the time-consuming processes of discovery and an evidentiary hearing. “Any extrarecord evidence . . . concerning . . . claims [adjudicated on the merits in state court] would therefore be inadmissible.” *Ryan v. Gonzales*, 568 U. S. \_\_\_ (No. 10-930, Jan. 8, 2013) (slip op., at 16-17). With the AEDPA reforms properly observed, federal habeas review should be expeditious in most cases, including capital cases. That has not happened to date in most states, but with the clarification in *Pinholster*, the central goal of AEDPA is within reach. This achievement of that central goal is gravely threatened by the specter of a regime in which the effectiveness of state habeas counsel routinely becomes a litigatable issue in federal habeas.

The *Martinez* opinion makes an unduly light assessment of its impact in the states where it applies. “It is likely that most of the attorneys appointed by the courts are qualified to perform, and do perform, according to prevailing professional norms; and, where that is so, the States may enforce a procedural default in federal habeas proceedings.” *Martinez v. Ryan*, 566 U. S. \_\_\_, 132 S. Ct. 1309, 1319, 182 L. Ed. 2d 272, 286 (2012). But this misses the point. One important purpose of the finality-enhancing reforms adopted by this Court and Congress is to reduce the need for the state to continually marshal resources to defend its judgment repeatedly in multiple courts. See *Teague v. Lane*, 489 U. S. 288, 310 (1989) (plurality opinion). Procedural default is like qualified immunity in that one purpose is to avoid the burden of litigation, not just prevail in litigation. Cf. *Mitchell v. Forsyth*, 472 U. S. 511, 526 (1985). If the state must incur a litigation burden comparable to litigating the merits in order to



prevail on the procedural default point, a primary purpose of the rule has been defeated.

If the petitioner's proposal is adopted, we can expect ineffective assistance of state habeas counsel claims to be made in the vast majority of capital cases. We need not speculate about this. We already see it in California, where the *Coleman* rule is not followed in state courts and ineffective assistance of habeas counsel is cause for a successive petition. See *In re Clark*, 5 Cal. 4th 750, 779-780, 855 P. 2d 729, 749 (1993). The result has been an unmitigated disaster.

Instead of the smooth, one-complete-review system envisioned by Congress and the Powell Committee, see *supra*, at 27, "capital defendants quite typically file a second habeas corpus petition in [the California Supreme] court to raise unexhausted claims." *In re Reno*, 55 Cal. 4th 428, 442, 283 P. 3d 1181, 1195 (2012). The petitions are filed by the truckload, with massive numbers of claims that are frivolous, obviously defaulted, or both. See *id.*, at 443, 283 P. 3d, at 1195. Despite the state court's prior admonitions not to attack prior counsel on mere omission of claims alone, that is routinely done. See *id.*, at 503, 283 P. 3d, at 1238.

Should the rule that has proved ~~such~~ a disaster in California be applied nationwide? If states wanted to avoid having claims adjudicated in federal court in the first instance, evading the important protection of § 2254(d), the only way they could do that is to soften their successive petition rules to resemble the California rule. But California is most definitely not an example



to be emulated in this area. Its system is widely regarded as dysfunctional on both sides of the aisle.<sup>12</sup>

Either way a state goes, a new layer of litigation will be introduced into a system of review that already has too many layers. If the state softens its procedural default rule, "exhaustion petitions" will be routine, and they will require examination of counsel's conduct in some detail to resolve. If the state holds the line on successive petitions, the effectiveness of state habeas counsel will have to be litigated in federal court in nearly every case, and a claim never presented to any state court will have to be litigated from scratch in federal court whenever state habeas counsel is correctly or erroneously found ineffective. Because both the gateway issue and the substantive claim will necessarily involve facts not in the state court record, the expeditious-resolution impact of § 2254(d) as interpreted in *Pinholster* will largely be negated.

This drastic step, contrary to the core purpose of AEDPA, is not necessary to deal with the problem of states refusing to appoint counsel or appointing unqualified counsel. Congress has already provided a remedy in AEDPA itself.

#### **IV. The correct judicial response to the problem of postconviction counsel is to implement the solution enacted by Congress.**

Deficiencies in the provision of state collateral counsel is a long-standing problem. The Congress of the United States has already enacted legislation to

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12. The California Supreme Court's decision not to follow *Coleman* is not, of course, the sole reason for the dysfunction, but it is a major contributing cause, as the abuses documented in *Reno* illustrate.

address it. What is astonishing is that Congress's solution remains unimplemented almost 17 years after its enactment.

In *Murray v. Giarratano*, 492 U. S. 1, 3-4 (1989), "[t]he courts below ruled that appointment of counsel upon request was necessary for the prisoners to enjoy their constitutional right to access to the courts in pursuit of state habeas corpus relief." This Court reversed. Concurring in that judgment, Justice Kennedy explained,

"Indeed, judicial imposition of a categorical remedy such as that adopted by the court below might pretermit other responsible solutions being considered in Congress and state legislatures. Assessments of the difficulties presented by collateral litigation in capital cases are now being conducted by committees of the American Bar Association and the Judicial Conference of the United States, and Congress has stated its intention to give the matter serious consideration. [Citation.]

"Unlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area, for we can decide only the case before us." *Id.*, at 14.

Those committees did deliver their reports soon thereafter. See Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (Aug. 23, 1989) ("Powell Committee"), reprinted in 135 Cong. Rec. 24,694 (1989); American Bar Association, Toward a More Just and Effective System of Review in State Death Penalty Cases: Recommendations and Report of the American Bar Association Task Force on Death Penalty Habeas Corpus (Oct. 1989) ("ABA Report").

While both reports recognized that appointment of qualified counsel in state proceedings was a key reform, the two proposals offered very different approaches to achieve that. The ABA would threaten states with a stick. The federal government would impose "specific mandatory standards." ABA Report 15. A state that failed to comply would lose some of the protections it had under the law of that time.

"To assure that the state provides competent representation and to avoid procedural delays as well as multiple review of the same issues, the following procedural barriers to federal habeas corpus review should not apply with respect to any state court proceeding in which the state court, in deprivation of the right to counsel, failed to appoint competent and adequately compensated counsel to represent the defendant/appellant/petitioner: exhaustion of state judicial remedies, procedural default rules, and the presumption of correctness of state court findings of fact." *Id.*, at 16.

Yet the state could appoint the best attorney in the world and pay him lavishly and still be stuck with the consequences of his error under this proposal. "Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel . . . ." *Ibid.* This proposition, considered and rejected by Congress, sounds a great deal like petitioner's proposed rule in the present case.

The Powell Committee approach was to offer a carrot rather than a stick. The proposal was optional with the states. Habeas Corpus Reform: Hearings before the Committee on the Judiciary, 101st Cong., 1st & 2d Sess., 42 (Nov. 8, 1989 & Feb. 21, 1990) (S. Hearing 101-1253) (statement of Justice Powell). In return

for adopting an appointment of counsel mechanism, review of capital cases would be reduced to “one fair and complete course of collateral review through the state and federal systems.” *Id.*, at 41. This would be achieved by, among other reforms, a strict limit on successive petitions. See *id.*, at 42.

The Powell Committee proposal was introduced by Senator Thurmond as S. 1760. The ABA proposal, as such, was a nonstarter. The Democratic alternative to the Thurmond bill, S. 1757 by Senator Biden, was the Powell Committee proposal amended by inserting some key elements lifted from the ABA proposal. Most pertinent of these for the present case was the “ignorance or neglect” exception to procedural default quoted above, a proposal that would have gutted this Court’s procedural default jurisprudence. See S. Hearing 101-1253, at 46, and n. 6 (statement of Justice Powell).

Habeas reform did not pass in the 101st Congress or in the two succeeding Congresses. In the 104th Congress, on February 8, 1995, the House passed H. R. 729, the Effective Death Penalty Act of 1995. See 141 Cong. Rec. 4120-4121 (1995). This act carried forward the Powell Committee limitations for capital cases. See Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 5, 17 (1995).

In the Senate, the provisions for an effective death penalty were ultimately consolidated with antiterrorism provisions in S. 635 and enacted as the Antiterrorism and Effective Death Penalty Act of 1996. As enacted, some of the provisions of the Powell Committee proposal, including the strict limit on successive petitions, applied to all habeas cases. Additional incentives were added to the new Chapter 154 to encourage states to opt in by providing appointment of counsel mechanisms. Among these were time limits to ensure that the reforms really would speed up the process, see 28



U. S. C. § 2266, a feature that the Powell Committee had decided to omit. See S. Hearing 101-1253, at 42 (statement of Justice Powell).

The incentive approach initially succeeded in encouraging some states to adopt appointment of counsel mechanisms, but it utterly failed in its delay-reducing goal due to a hostile reception by the federal courts charged with enforcing it. *Spears v. Stewart*, 283 F. 3d 992 (CA9 2002), exemplifies the problem. In response to Congress's promise of expedited federal review, the State of Arizona established a mechanism for the appointment of counsel. See *id.*, at 1009. After concluding, correctly, that Arizona's mechanism complies with all of the requirements that appear in the text of the statute, see *id.*, at 1012-1016, the Ninth Circuit claimed to find an additional requirement of timeliness of appointment that appears nowhere in the text. See *id.*, at 1016-1019. Arizona was denied the promised benefit of Chapter 154 even though it had done everything the text of the statute requires. With the promised reward snatched away by the federal courts, the states that had not yet created appointment of counsel mechanisms no longer had the incentive that Congress had intended.

Congress reacted to *Spears* and other decisions in the USA PATRIOT Improvement and Reauthorization Act of 2005, 120 Stat. 192 (2006). By making significant revisions to Chapter 154, Congress demonstrated its determination to see this dormant law implemented. The time limit on District Court adjudication was expanded from 180 days to 450 days in recognition that the earlier limit may have been too severe. See § 2266(b)(1)(A). The requirements to qualify for the chapter were expressly limited to those stated in the text, § 2265(a)(3), for the specific purpose of abrogating *Spears*. See 152 Cong. Rec. 2445-2446 (2006) (state-

ment of Sen. Kyl). The decision as to whether a state is qualified was removed from the habeas court, with its conflict of interest, and given to the Attorney General of the United States with review by the Court of Appeals for the District of Columbia Circuit, the one circuit that does not hear habeas petitions from state prisoners. See *ibid.*; § 2265.

Although enacted over seven years ago, the revised Chapter 154 has not been implemented to date because of an inordinate delay in promulgating the implementing regulations. See § 2265(b). There are multiple reasons for that delay, but it should be near an end. A revised set of regulations was published in the Federal Register nearly two years ago. See Certification Process for State Capital Counsel Systems, 76 Fed. Reg. 11705 (Mar. 3, 2011). The comment period ended June 1, 2011. Then the Department of Justice published a new notice asking for comment on a set of changes to the not-yet-final regulations, changes that added substantive requirements in addition to those established by Congress in direct contradiction of the unambiguous language of § 2265(a)(3). See Certification Process for State Capital Counsel Systems, 77 Fed. Reg. 7559 (Feb. 13, 2012). The comment period on this notice expired March 14, 2012, and the Department of Justice has done nothing since.

The argument before this Court is to address the problem by expanding the cause and prejudice exception to the procedural default rule, expanding *Martinez*'s narrow exception to *Coleman* into an exception so wide it swallows the rule. The ABA recommended that course, Congress considered that course, and Congress rejected that course.

If it was not proper for this Court to craft its own solution to this specific problem while Congress was considering the question, *Murray v. Giarratano*, 492



U. S., at 14 (Kennedy, J., concurring in the judgment), it would be even less proper for this Court to craft its own solution after Congress has enacted one. It would be still more improper for this Court's solution to be along the lines of the one that Congress considered and rejected.

The judiciary does indeed have a role in fixing the problem of appointment of counsel for state collateral review in capital cases. That role is to promptly implement the solution enacted by Congress. As soon as the administrative portion of that process is completed, which should be soon,<sup>13</sup> the D. C. Circuit and this Court should complete their portion of the qualification process expeditiously, and the habeas courts should then implement Chapter 154 faithfully and not grudgingly for those states that qualify.

Whether Texas has done a proper job of providing collateral counsel for capital defendants is a question that can and should be decided within the framework of Chapter 154. That is the solution that Congress enacted twice, and that is the solution that the judiciary should implement.

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13. If the Department of Justice continues to drag its feet, then a mandamus intervention may be necessary. Hopefully, it will not come to that.

**CONCLUSION**

The judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

January, 2013

Respectfully submitted,

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Criminal Justice Legal Foundation*

**AMICUS  
CURIAE  
BRIEF**

No. 11-10189

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IN THE  
**Supreme Court of the United States**

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CARLOS TREVINO,

*Petitioner,*

v.

RICK THALER, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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**BRIEF AMICI CURIAE OF THE FAMILIES OF LINDA  
SALINAS AND OTHER CRIME VICTIMS IN SUPPORT  
OF RESPONDENT**

---

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## INTEREST OF AMICI CURIAE

Amici Frank and Dawn Salinas, Nancy Kincaid, Melody Shadix, Linda Smith, and Misty Caylor are survivors of the horrific crimes committed by petitioner Carlos Trevino and other Texas prisoners who have petitioned this Court to revive their long-ago forfeited claims of ineffective assistance of trial counsel.<sup>1</sup>

Amici, like crime victims and survivors across the country, have waited years to see just punishment imposed on the criminals who victimized them and their families, and they have been forced to endure repeated and heart-wrenching reversals as prisoners are given one opportunity after another to stave off punishment. Amici, and crime victims generally, have a direct interest in ensuring justice is done without unreasonable delay—an interest never raised or considered in *Martinez v. Ryan*. Amici believe that interest must be given its appropriate, substantial weight in any equitable decision to excuse procedural default,

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for amici certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amici or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk.

and that, in tandem with the state's interest in finality of its judgments, the interest of victims tips the equitable balance against providing Texas prisoners with yet another avenue for delay.

### SUMMARY OF ARGUMENT

Postconviction review inevitably imposes costs, but those costs should not be disproportionately borne by the victims and survivors of crime. That is far too often the result, however, when those most directly affected by criminal acts are taken least into account in deciding the procedural rules that govern postconviction review.

Extending the equitable exception to procedural default established in *Martinez v. Ryan* would force that type of disproportionate burden onto the shoulders of survivors, victims, and their families. The fairness that *Martinez's* analysis strove to find is illusory if the interest of these victims is not weighed in the balance. The stories and experiences of amici—who have waited years for justice in this and other, similar cases and persevered against delay, reversal, fear, and frustration through seemingly endless rounds of appeals—give that interest concrete form. When the interest amici represent is added to the scale, the balance of equities struck in *Martinez* shifts decisively against extending its rule further.

## ARGUMENT

I. ANY CONSIDERATION OF EXTENDING  
*MARTINEZ* V. *RYAN*'S EQUITABLE RULE  
MUST TAKE INTO ACCOUNT THE INTEREST  
OF CRIME VICTIMS AND SURVIVORS.

*Martinez v. Ryan* adopted a narrow and limited “qualification” to the general rule “that an attorney’s negligence in a postconviction proceeding does not establish cause” to excuse a habeas petitioner’s procedural default. 132 S.Ct. 1309, 1319 (2012); see *Coleman v. Thompson*, 501 U.S. 722, 753-754 (1991). Under *Martinez*, federal courts may find cause to excuse a habeas petitioner’s procedural default of claims of ineffective assistance of trial counsel if the state’s criminal-law system, like Arizona’s, requires such claims to be brought in initial-review collateral proceedings, rather than on direct appeal, but fails to provide constitutionally adequate counsel to litigate those claims on initial review. 132 S.Ct., at 1318.

*Martinez*’s qualification to *Coleman*’s general rule derives not from constitutional command, but from “the exercise of the Court’s discretion.” *Ibid.* It “reflect[s] an equitable judgment,” *ibid.*, that a state’s interests in the finality of its judgments and the prudent stewardship of scarce taxpayer resources are outweighed, in certain “limited circumstances,” by the value of hearing otherwise-barred ineffective-assistance claims first raised by a



habeas petitioner on what is at least the third review of his conviction. See *id.*, at 1319-1320. Trevino now asks the Court to again weigh the equities and extend *Martinez's* "equitable ruling" to him and to Texas prisoners generally. *Id.*, at 1319.

No such equitable judgment is required here because, as respondent Thaler correctly points out, the preconditions for such an analysis are absent. Texas, unlike Arizona, has not "deliberately [chosen] to move trial-ineffectiveness claims outside of the direct-appeal process." *Id.*, at 1318. Far from "bar[ring] defendants from raising ineffective-assistance claims on direct appeal," *id.*, at 1320, Texas provides multiple opportunities for defendants to raise such claims in phases of criminal proceedings in which assistance of counsel is guaranteed. See Resp. Br. 26-35.

If the Court were to recapitulate *Martinez's* equitable analysis for Texas, however, its balance must be adjusted to take into account all of the interests involved. Because neither side in *Martinez* raised the issue of interests beyond just those of the convict and the state, *Martinez's* equitable calculus takes no account of the most crucial outside interest—that of the victims and survivors directly affected by the crimes of Trevino and other prisoners.

Crime victims and survivors have a substantial interest in seeing that justice is

done to those who have wronged them, an interest that is deeply affected by procedural rules like *Martinez* that exacerbate the delay in finally resolving prisoners' appeals. See Russell, Reluctance to Resentence: Courts, Congress, and Collateral Review, 91 N.C. L. Rev. 79, 155 (2012) (acknowledging that "the harm to victims" from "a lack of finality of criminal judgments and prolonged litigation" "is quite real"); Karamanian, Victims' Rights and the Death-Sentenced Inmate: Some Observations and Thoughts, 29 St. Mary's L.J. 1025, 1031 (1998) ("The necessary delay associated with habeas appeals . . . offend[s] at least two of the goals of capital punishment, swift retribution and deterrence. In addition, from the perspective of the victim's family, a delay in the execution prevents any meaningful closure.").

The reparative interest held by victims is distinct from the state interests recognized in *Martinez* and commonly noted in the habeas context—chiefly, the state's interest in the finality of its courts' judgments. See, e.g., Gruber, A Distributive Theory of Criminal Law, 52 Wm. & Mary L. Rev. 1, 46-47 (2010) (recognizing the interest served by victims' rights laws as an "interest[] in healing through participation and punishment"). And because of its reparative nature, the interest of victims in seeing justice done is distinct even from the state's own retributive interest. See Christopher, Deterring Retributivism: The Injustice of "Just"

Punishment, 96 Nw. U. L. Rev. 843, 938 (2002) (arguing that “[t]aking into account the interest of victims” is “corrective justice and not retributive justice”).

Despite its absence from *Martinez’s* analysis, the “harm caused by the defendant as a result of the crime” and its impact on the victims “has understandably been an important concern of the criminal law.” *Payne v. Tennessee*, 501 U.S. 808, 819 (1991). Indeed, as a member of this Court once observed, “[a]s a simple matter of distributive justice, a decent and compassionate society should recognize the plight of its victims and design its criminal system to alleviate their pain, not increase it.” Justice Anthony M. Kennedy, Address at Sixth South Pacific Judicial Conference (Mar. 3-5, 1987) (quoted in Nicholson, Victims’ Rights, Remedies, and Resources: A Maturing Presence in American Jurisprudence, 23 Pac. L.J. 815, 828 (1992)).

Legislatures and courts at both the federal and state levels have recognized the importance of crime victims’ interest in seeing justice done, and have enshrined that recognition in statutes specifically enumerating rights accorded to victims, survivors, and their families.<sup>2</sup> In the

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<sup>2</sup> Congress has often led the way in such efforts. *E.g.*, Victim’s Rights and Restitution Act of 1990, Pub. L. 101-647, Title V, 104 Stat. 4789 (Nov. 29, 1990) (codified at 42 U.S.C. §10607 and 18 U.S.C. §3771); Crime Victims’ Rights Act of 2004, Pub. L.

federal system, crime victims and survivors are thus guaranteed the right “to be reasonably heard,” “to proceedings free from unreasonable delay,” and “to be treated with fairness and with respect for the victim’s dignity and privacy,” including in federal habeas proceedings. 18 U.S.C. §3771(a), (b)(2)(A), (e).

With the advent of these and similar laws, this Court has likewise become increasingly solicitous of victims and protective of their statutorily ensured role in the criminal-justice process. *E.g.*, *Payne*, 501 U.S., at 827-830 (overruling prior holdings that had barred victim-impact evidence in capital sentencing hearings). Its attentiveness has rightly extended to a deepening recognition of the impact on victims and survivors of the seemingly never-ending rounds of appeals, stays, and petitions afforded to prisoners. “One has to wonder and worry about the effect” that the possibility that the sentence will be delayed or the conviction reconsidered years after the trial

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108-405, Title I, 118 Stat. 2260 (Oct. 30, 2004) (codified at 18 U.S.C. §3771). Texas and other states have uniformly followed suit. *E.g.*, Tex. Const. art. I, §30; Tex. Code Crim. Proc. art. 42.03, §1(b); see Schwartz, *The Victims’ Rights Amendment*, 42 Harv. J. on Legis. 525, 526-527 & nn.13-14 (2005) (“[A]ll fifty states . . . have various victims’ rights statutes; . . . thirty-two states have victims’ rights constitutional amendments.”).

“has on the families of the victims, who have to live with the possibility—and often the reality—of retrials, evidentiary hearings, and last-minute stays of execution for decades after the crime.” *Baze v. Rees*, 553 U.S. 35, 81, n.17 (2008) (Stevens, J., concurring in the judgment) (quoting Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L. Rev. 1, 17-18 (1995)).<sup>3</sup>

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<sup>3</sup> Justice Stevens argued that these consequences flow not from “unnecessarily elaborate and lengthy appellate procedures” but rather “result ‘in large part from the States’ failure to apply constitutionally sufficient procedures at the time of initial conviction or sentencing.” *Ibid.* (quoting *Knight v. Florida*, 528 U.S. 990, 998 (1999) (BREYER, J., dissenting from denial of cert.)). Whatever the merits of that view in general, Trevino’s argument disproves it in the context of this case: Texas does not and did not force ineffective-assistance claims into habeas corpus proceedings.

Rather, Trevino was provided an avenue—direct appeal—in which to challenge, with guaranteed counsel, his conviction and sentence. Had that counsel been inadequate, *Murray v. Carrier* would provide the necessary cause to avoid default of his *Wiggins* claim. See 477 U.S. 478, 488 (1986). But Trevino has never complained that his direct-appeal counsel was constitutionally inadequate.

Thus, if the survivors of the crimes of Trevino and other Texas prisoners who would benefit from extending *Martinez* are accordingly to be forced to



## II. THE EXPERIENCES OF AMICI, VICTIMS OF TREVINO'S AND OTHER CRIMINALS' HORRENDOUS ACTS, MAKE CONCRETE THE INTEREST THAT IS AT STAKE.

Amici's experiences exemplify precisely the concerns Justice Stevens so ably acknowledged.

*Nancy Kincaid*

It has been fifteen years since amica Nancy Kincaid watched the unprovoked murder of her husband, Houston Police Department Officer Kent Kincaid, at the hands of Anthony Haynes.<sup>4</sup>

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endure further appeals and delays in seeing justice done, it will not be because Texas chose to implement procedures that were deemed constitutionally ineffective at the time at which they were applied.

<sup>4</sup> Haynes has filed a successive federal habeas petition on the ground that his attorney provided purportedly inadequate assistance during the sentencing phase of his capital-murder trial. See *Haynes v. Thaler*, No. 12-70030, \_\_ Fed. App'x \_\_, 2012 WL 4858204, at \*1-2 (CA5 Oct. 15, 2012). Like Trevino, he argues that *Martinez v. Ryan* provides cause to excuse his failure to exhaust his ineffective-assistance claim in state habeas proceedings, despite a district court's previous rejection of his claim that his state habeas counsel was constitutionally ineffective. *Ibid.* Haynes's most recent petition for certiorari—his fourth—remains pending before the Court. *Haynes v. Thaler*, No. 12-6760 (filed Oct. 16, 2012).



As an eyewitness to her husband's shooting, her trial testimony was crucial to Haynes's conviction, but testifying was among the hardest things she has ever done—second only to telling her children that their father was dead. The worry of having to repeat that experience in a retrial became a sickening possibility when Haynes was granted a new trial, ten years after his conviction, by the Fifth Circuit. See *Haynes v. Quarterman*, 561 F.3d 535 (CA5 2009), reversed *sub nom. Thaler v. Haynes*, 130 S.Ct. 1171 (2010). Worse than the confusion and frustration engendered by that judicial about-face, though, is the fear Ms. Kincaid faces of seeing her children relive, as adults, the events of Officer Kincaid's murder if a sentencing-phase retrial were necessary.

It has been hard enough for the Kincaids just waiting for justice. In June 2012, the family was informed that a date had finally been set in October for Haynes's execution. For four long months, thinking about Haynes consumed their lives once again—it was all that was on Ms. Kincaid's mind, all that the family talked about. In October, as the execution date approached, the family went to Huntsville, Texas, even though only Officer and Ms. Kincaid's youngest daughter—who had been only six years old when she lost her father—wanted to actually be present for Haynes's execution. When the Court's order staying the sentence came through only hours before Haynes was set to be

executed, Ms. Kincaid could not believe it was happening, after everything her family had been put through. Her oldest daughter, to whom Haynes had previously expressed remorse, felt betrayed by the delay, particularly after reading an “ecstatic” Haynes’s interviews with the press.<sup>5</sup> After robbing them of fourteen years with their husband and father, Ms. Kincaid felt, Haynes had again been able to rob them of four more months of their lives, aided this time by the legal system that was supposed to provide them justice.

*Linda Smith, Misty Caylor, and Melody Shadix*

Since Mark Caylor and Kai Geyer, only fifteen and seventeen years old, were murdered along with a third boy, Steven Watson, in 1998—exactly fifteen years ago yesterday—their mothers, amici Linda Smith and Melody Shadix, and Mark’s sister, amica Misty Caylor, have watched three different execution dates for John Balentine come and go because of last-minute procedural machinations by his defense team.<sup>6</sup>

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<sup>5</sup> Turner, Houston Cop Killer Haynes Granted Stay of Execution, *Houston Chronicle* (Oct. 18, 2012).

<sup>6</sup> Balentine has also filed a successive federal habeas petition raising a claim of constitutionally ineffective assistance during his capital sentencing phase. See *Balentine v. Thaler*, No. 03-CV-00039, 2012 WL 3262744, at \*1-2 (ND Tex. July 30, 2012).

In 2009, long after his first state and federal habeas petitions had been denied, the Fifth Circuit stayed Balentine's sentence for the first time one day before his scheduled execution, just as Ms. Smith and Ms. Caylor drove into Huntsville to witness it.

Two years later, amici got as far as the warden's office in their second attempt to see Balentine receive justice, only to have this Court grant a stay in light of the decision to review *Martinez*, less than an hour before the scheduled execution. Balentine, told about the stay, informed the press he was "happy and relieved."<sup>7</sup> Ms. Shadix, in contrast, was left distraught and had to be comforted by prison officials.<sup>8</sup>

Just last year, as amici waited in the holding room adjoining the death chamber, Balentine's present stay came down only

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In it, he seeks to excuse under *Martinez* his failure to exhaust that claim until his third state habeas application. *Ibid.* His petition for certiorari from the denial of that request—his fourth, just like Haynes—also remains pending before the Court. *Balentine v. Thaler*, No. 12-5906 (filed Aug. 21, 2012).

<sup>7</sup> MacLaggan, High Court Delays Texas Execution, Reuters (June 15, 2011).

<sup>8</sup> Cervantes, Postponed Execution Frustrates Relatives, Amarillo Globe-News (June 18, 2011).

minutes before his sentence was to be carried out. Ms. Smith, disabled since 2001 and put in severe pain by extended driving, has thus endured the grueling, nearly 1200-mile trip from Amarillo to Huntsville and back three times, each fruitlessly.

Even though the Court already denied the earlier petition that it had held for *Martinez* itself, *Balentine v. Texas*, 132 S.Ct. 1791 (Mar. 26, 2012), Ms. Smith, Ms. Caylor, and Ms. Shadix are once again forced to endure more delays and the threat of a possible retrial on sentencing based on the very same arguments the Court rejected in denying that petition—all for a convict whose claim of ineffective assistance at sentencing does not even implicate his confessed guilt of murdering Mark, Kai, and Steven.

### *Frank and Dawn Salinas*

Frank and Dawn Salinas, the parents of Linda Salinas, have waited longer for justice from Carlos Trevino than the fifteen years Linda herself was alive. Told at the outset that it could take as much as twelve years to bring finality to Trevino's appeals, it has taken almost seventeen already, with no end in sight. The criminal-justice system has given them no closure to the nightmare of their daughter's rape and murder, only waiting. And they fear that, as years continue to tick past and Trevino's attempts to avoid his punishment

continue, one or both of them may well not live long enough to see justice imposed on the man who took Linda from them.

### III. THE SUBSTANTIAL EQUITABLE INTEREST OF VICTIMS WEIGHS SHARPLY AGAINST EXTENDING *MARTINEZ*, AND DOUBLY SO IN THE CONTEXT OF *WIGGINS* CLAIMS.

“Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens, other victims are left behind.” *Payne*, 501 U.S., at 838 (Souter, J., concurring). Yet the Court might be excused for not immediately recognizing the names of Kent Kincaid, Mark Caylor, Kai Geyer, Steven Watson, or Linda Salinas. After all, in the more than twenty appellate rulings that comprise the voluminous history of these criminals’ federal habeas proceedings, the people whose lives they ended are virtually disregarded. The other victims of these crimes—the families of those murdered; amici here—are simply never mentioned. Less justifiable, however, would be a failure to recognize and respect the interest of these and other victims and survivors in deciding whether *Martinez*’s equitable exception to procedural default should be extended beyond its original, narrow rationale.

In *Martinez*’s weighing of the equities, that interest—the interest in seeing justice done without undue delay—falls squarely against providing convicts like Trevino, Haynes, and



Balentine with yet more chances to raise claims they could have raised previously, but did not. Between their direct appeals, state habeas applications, and federal habeas petitions, these prisoners have been provided with a surfeit of opportunities to plead their cases—and many, like Haynes and Balentine, have gone well beyond that into abuse of the habeas writ in their attempts to entice courts into taking up their various forfeited claims. It is not simply the state's interest in finality that is impacted by allowing such abusive efforts to continue unchecked; it is also the interest of each of these criminals' victims who need to know that justice has finally been done, and that there is no longer any need to fear the risk of retrial or release. Combined with the state interests already recognized in *Martinez's* analysis, this interest tips the balance against excusing procedural defaults of Texas prisoners even if Texas's system were similar to Arizona's in the relevant respect (which it is not).

The inequity of extending *Martinez* is particularly stark for prisoners like Trevino, Haynes, and Balentine. The interest of victims carries the greatest equitable weight when the ineffective-assistance claim for which excuse for a procedural default is sought arises under *Wiggins v. Smith*, 539 U.S. 510 (2003)—that is, when the prisoner argues, as Trevino, Haynes, and Balentine do, that his trial counsel was ineffective during sentencing in ways that do



not directly challenge the result of the guilt-innocence phase of the trial. Conversely, a prisoner's equitable argument is weakest in that scenario—a prisoner whose guilt is clear has little if any claim on a procedural remedy based in fairness, as *Martinez's* qualification of the procedural-default rule is.

Indeed, extending *Martinez* simply for the purpose of resuscitating otherwise-barred *Wiggins* claims contravenes the fundamentally innocence-favoring corrective purpose of habeas corpus. "In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, . . . the 'ends of justice' require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986); accord *Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970). *Wiggins* claims implicate no such showing.

Even if *Martinez* were extended to Texas and other states, such extension need not be, as Trevino assumes, an across-the-board determination. Rather, the equitable balancing adopted in *Martinez* suggests that *Wiggins* claims and other varieties of ineffective-assistance claims that do not necessarily attack

the prisoner's guilt should be excluded from *Martinez's* ambit entirely, even if its rule were extended to apply to other, garden-variety ineffective-assistance claims raised by Texas prisoners.

### CONCLUSION

"[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.). Any conception of fairness in this case would be deeply flawed by a failure to recognize, and account for, the interest of crime victims and survivors in seeing justice done without unreasonable delay. When that interest is given its proper weight in the analysis, *Martinez's* equitable balance shifts decisively against excusing procedural default for Texas prisoners who have failed to raise and exhaust their ineffective-assistance claims in state court, and particularly so for prisoners like Trevino whose claims under *Wiggins v. Smith* do not even implicate their guilt of the crimes of which they were convicted.

For these reasons, amici respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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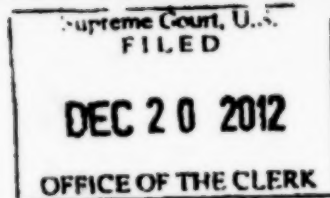
*Families of Linda Salinas and*

*Other Crime Victims*

**AMICUS  
CURIAE  
BRIEF**

RECORD  
AND  
BRIEFS

No. 11-10189  
CAPITAL CASE



**In The  
Supreme Court of the United States**

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CARLOS TREVINO,

*Petitioner,*

v.

RICK THALER, Director, Texas Department of  
Criminal Justice, Correctional Institutions Division,

*Respondent.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fifth Circuit**

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**BRIEF OF THE STATE BAR OF TEXAS  
AS AMICUS CURIAE  
IN SUPPORT OF NEITHER PARTY**

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

*Amicus*, the State Bar of Texas (the State Bar), is a public corporation and an administrative agency of the judicial department of the State of Texas.<sup>2</sup> It is a unified bar with a present membership of approximately 100,000 lawyers.

In 2006, the Board of Directors of the State Bar adopted Guidelines and Standards for Texas Capital Counsel.<sup>3</sup> These *Guidelines* articulate the statewide standard of practice for the defense of capital cases in Texas, including all post-conviction proceedings. The adoption of these *Guidelines* is an important accomplishment for the State Bar in its mission to support the administration of justice in Texas.

When this case was called to the attention of the State Bar's President, he invoked the Bar's rarely-utilized procedure for obtaining authorization to file an *amicus* brief in the Bar's own name. *See generally* § 8.02 of the Board of Directors Policy Manual (Revised June 2012). As a unified bar, the *amicus* does

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<sup>1</sup> Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this Brief. Letters reflecting their written consent are filed with the clerk. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> TEX. GOV'T CODE ANN. § 81.011(a) and (c) (West 2005).

<sup>3</sup> State Bar of Texas, Guidelines and Standards for Texas Capital Counsel, 69 Tex. B.J. 966 (2006).

not take a position in support of either party in this case. Rather, its interest is in the singular opportunity presented here, to urge the Court to recognize the *Texas Guidelines* as a statement of the prevailing norms of practice for effective assistance of post-conviction counsel in Texas capital cases.

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### SUMMARY OF ARGUMENT

In 1995, the Texas Legislature enacted the Habeas Corpus Reform Act of 1995 (the Texas Act) and in 1996 Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Although far from perfect, the Texas Act seeks to provide competent counsel with adequate compensation and resources for post-conviction review of capital cases. The Texas Act creates a unitary system of virtually simultaneous direct appeal and post-conviction habeas corpus proceedings.

Inherent in the unitary system are potential conflicts among appellate counsel and habeas counsel. In 2006, the State Bar Board adopted the Guidelines and Standards for Texas Capital Counsel (the *Texas Guidelines*) to assist appellate and habeas counsel in providing effective assistance within the constraints of the unitary system.

The *Texas Guidelines* articulate the clearly established duties of counsel in post-conviction direct appeal and post-conviction habeas corpus proceedings. Included in the *Texas Guidelines* is a reiteration

of counsel's duty to conduct a thorough investigation at the post-conviction habeas corpus stage to find and present mitigating evidence. For this reason, the State Bar urges the Court to recognize the *Guidelines* as "guides to determining what is reasonable" in Texas capital cases. See *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

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## **ARGUMENT**

- I. State post-conviction habeas corpus practice in Texas capital cases.**
  - A. A short history of the development of the Texas *Guidelines*.**

In 1995, the Texas Legislature enacted the Habeas Corpus Reform Act of 1995 (the Texas Act). It made three major changes to Texas post-conviction procedure in capital cases. First, it adopted a unitary system for death penalty habeas review in which direct appeals and habeas review proceed along parallel paths at roughly the same time. Second, it adopted the abuse of the writ doctrine, as used in federal court, that limits an inmate to a one-time application for a writ of habeas corpus, except in exceptional circumstances. Finally, it provided for the appointment and payment of counsel to represent all those convicted of capital murder and sentenced to death in their habeas petitions. See *Ex parte Kerr*, 64 S.W.3d 414, 418 (Tex. Crim. App. 2002).



A year after Texas enacted the Habeas Corpus Reform Act, Congress passed and the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>4</sup> *See, e.g., Fry v. Pliler*, 551 U.S. 112, 119 (2007). Under that Act, federal courts generally lack authority to grant habeas relief unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . ." 28 U.S.C. § 2254(d)(1). *See id.*

Seven years later, in February 2003, the American Bar Association released a revised version of its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (the ABA *Guidelines*). The ABA asked state bar associations to consider adopting its *Guidelines* and the State Bar of Texas, working through its Legal Services to the Poor in Criminal Matters Committee, quickly began reviewing the ABA *Guidelines* and drafting its own.

The Committee afforded trial judges, judges on the Texas Court of Criminal Appeals, prosecutors, and criminal defense attorneys an opportunity to comment on and suggest revisions to the Texas *Guidelines*. After several revisions, the Committee presented the *Guidelines* to the State Bar Board of Directors, which approved them at its meeting on April 21, 2006.

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Pub. L. No. 104-132, § 104(1), 110 Stat. 1214 (April 24, 1996).

The Texas *Guidelines* have been recognized by the Texas legislature as the standards to which habeas counsel should be held. In creating the Texas Office of Capital Writs in 2009 to accept post-conviction habeas corpus appointments in capital cases, the Texas legislature incorporated the Texas *Guidelines* into the statutory provision governing the requirements for applicants for the directorship of the Office of Capital Writs.<sup>5</sup> Such applicants are required to “exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases, *as described by the Guidelines and Standards for Texas Capital Counsel, as published by the State Bar of Texas.*” TEX. GOV’T CODE ANN. § 78.004(b)(1) (West Supp. 2012) (emphasis supplied).

Brad D. Levenson, the present director of the Office of Capital Writs, indicated to the State Bar that his office uses the Texas *Guidelines* in training its attorneys and investigators, and that his staff regularly reviews and discusses the *Guidelines* to ensure they are meeting the Texas capital defense standards when representing capital defendants.

### **B. Capital practice under a unitary system.**

Under the Texas unitary post-conviction review system created by the 1995 Texas Act, state appellate

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<sup>5</sup> See TEX. CODE CRIM. P. ANN. art. 11.071 § 2(b) and (c) (West Supp. 2012) and TEX. GOV’T CODE ANN. § 78.052 (West Supp. 2012).

counsel must immediately request the appellate record from the convicting court clerk and the court reporter, pursuant to TEX. R. APP. P. 34.5 and 34.6. The records must be filed with the clerk of the Court of Criminal Appeals within 60 days if a motion for new trial is not filed, or within 90 days after such a filing, if extensions are not requested or granted. *Id.*, Rule 35.2. Then counsel must file the appellant's brief within 30 days after the record is filed, if extensions are not requested or granted. *Id.*, Rule 38.6(a).

Concurrently, post-conviction habeas counsel must begin investigating the factual and legal grounds for filing an application for a writ of habeas corpus. Tex. CODE CRIM. P. ANN. art. 11.071, § 3(a). Habeas counsel must file the application in the convicting court not later than 180 days after the date the convicting court appoints counsel, or not later than the 45th day after the state's original brief is filed on direct appeal, whichever date is later. *Id.*, § 4(a). For good cause shown, and after notice and an opportunity to be heard by the state's counsel, the convicting court may grant one 90-day extension of the filing date. *Id.*, § 4(b).

A result of the Texas unitary system is an inherent conflict among appellate counsel and habeas counsel. This issue was summarized in a 2002 State Bar continuing legal education paper as follows:

Conflicts among counsel handling the direct appeal and the writ of habeas corpus are inherent in a unitary system.... Habeas

counsel must question the appellate lawyer's competence and ability at the very time appellate counsel is preparing and arguing the appeal. . . . At best, appellate counsel is distracted, at worst, appellate counsel may be rendered ineffective by such conflicts.

It is particularly difficult for habeas counsel in a state writ to perform his or her duty ethically. Raising ineffective assistance of appellate counsel at the very time the appeal is being argued and decided may act to deprive the client of relief on appeal. Failure to raise such a claim will act to deprive the client of relief on habeas corpus review. Habeas counsel faces the Hobson's choice of either arguing that appellate counsel has not adequately raised and briefed an issue, or that the issue was not adequately preserved by trial counsel, thus, hurting the client's chance of prevailing on appeal, or not raising the same in the original writ and risking permanent loss of the issue on habeas review. This conflict is without apparent resolution.<sup>6</sup>

The 2006 Texas *Guidelines*, including Guidelines 12.2(A) and (B), were promulgated by the State Bar to assist appellate and post-conviction habeas counsel in providing effective assistance within the constraints of this conflict. Guideline 12.2(A) articulates

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<sup>6</sup> Cynthia Hujar Orr and John P. Niland, *Capital Murder: Art. 11.071*, State Bar of Texas, 28th Annual Advanced Criminal Law Course (2002), at 24.

the duties of direct appeal counsel, while 12.2(B) explains the duties of habeas corpus counsel, including 12.2(B)(5), the duty to conduct a mitigation investigation.

**II. The prevailing norms of practice in Texas post-conviction capital habeas proceedings, articulated in the 2006 Texas Guidelines, were clearly established long before 2006.**

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The portion of the AEDPA (28 U.S.C. § 2254), applicable to cases arising in a unitary system jurisdiction, provides, in pertinent part, that an application for a writ of habeas corpus shall not be granted with respect to any adjudicated state court claim unless the adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” Section 2254(d)(1). This Court has long held that § 2254(d)(1)’s “clearly established” phrase “refers to the holdings, as opposed to the dicta, of this Court’s decisions as of the time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362 (2000). In most situations, the task of determining what is clearly established will be straightforward. *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

The relevant state court decisions in this case were rendered on May 12, 1999, when the Texas



Court of Criminal Appeals affirmed petitioner's conviction and sentence on direct appeal, *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999), and on April 4, 2001, when the Texas Court of Criminal Appeals denied petitioner's first state post-conviction habeas corpus application. *Ex parte Trevino*, WR-48, 153-01 (Tex. Crim. App. April 4, 2001) (unpublished). Thus those dates mark the threshold for determining what relevant law was clearly established at the time.

One governing legal principle that emerges as "clearly established" under § 2254(d)(1) is counsel's duty to investigate and develop mitigating evidence in a capital case.<sup>7</sup>

The Texas *Guidelines* restated this standard in 12.2(B)(5)(a), "The Mitigation Investigation," within the broader context of 12.2(B), "Duties of Habeas Corpus Counsel." The question before the court in this case clearly implicates the Texas *Guidelines*.

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<sup>7</sup> This Court in *Strickland v. Washington*, 466 U.S. 668 (1984) not only clearly articulated the legal principles that govern claims of ineffective assistance of counsel, for which it is most often cited, *id.* at 697, but it also defined counsel's duty in a capital sentencing proceeding as a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary, *id.* at 691, and to develop any such mitigating evidence to present to a judge or jury considering the sentence of death.



**III. This Court should accord the Texas *Guidelines* the same weight in Texas post-conviction capital habeas cases as is given to the ABA criminal *Guidelines* in other criminal cases.**

While this Court has declined to articulate specific guidelines for appropriate attorney conduct in ineffective assistance cases, *Wiggins v. Smith*, 539 U.S. 510, 521 (2003), and no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant, this Court has recognized that prevailing norms of practice as reflected in American Bar Association "standards and the like" are guides to determining what is reasonable. *Strickland*, 466 U.S. at 688-89. Restatements of professional standards, then, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place. *Bobby v. Van Hook*, 558 U.S. 4, 16 (2009). See also Gary Feldon and Tara Beech, *Unpacking the First Prong of the Strickland Standard: How to Identify Controlling Precedent and Determine Prevailing Professional Norms in Ineffective Assistance of Counsel Cases*, 23 U. Fla. J.L. & Pub. Pol'y 1 (2012) at 19 and n. 109, citing secondary evidence other than the ABA *Guidelines* on which the Court has relied from time to time.

In that vein, the State Bar promulgated the Texas *Guidelines* to establish "a statewide standard of

practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any State of Texas jurisdiction." *Texas Guidelines* 1.1. The *Texas Guidelines* are informed by the 2003 version of the *ABA Guidelines*, particularly Guideline 10.15.1 et seq., "Duties of Post-Conviction Counsel," which incorporates Guideline 10.3 et seq., including Guideline 10.7, "Investigation." Guideline 10.7, in turn, is based on portions of Guideline 11.4.1 of the 1989 version of the *ABA Guidelines*.

Captioned "Duties of Habeas Corpus Counsel," Guideline 12.2. of the *Texas Guidelines* articulates in great detail the duties and responsibilities in representing a capital defendant at both the appellate and post-conviction habeas corpus stage of state proceedings, as well as at the federal habeas corpus stage. The state appellate and post-conviction habeas proceedings in this case came in 1999 and 2001, respectively, prior to the adoption of the *Texas Guidelines*. See *Bobby*, 558 U.S. at 16. This timeline does not preclude the application of the *Texas Guidelines* to this case, however, because the *Texas Guidelines* are thoroughly grounded in the prevailing norms of practice previously articulated by this Court for effective assistance of counsel in capital appellate and post-conviction habeas proceedings. Texas Guideline 12.2(B)(5), in particular, addresses the necessity of the mitigation investigation:

Habeas corpus counsel must conduct a mitigation investigation. . . . [A]t least one

member of the defense team should be qualified to screen for mental or psychological disorders or defects and recommend further investigation of the client if necessary. Habeas corpus counsel should retain an independent mitigation specialist as soon as possible after appointment.

*Bobby*, then, does not preclude the Court's consideration of the Texas *Guidelines* in the context of this case, even though the state court judgments predate their adoption. See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 170 n. 6 (1986) (citing the 1980 ABA Standards for Criminal Justice and the 1983 ABA Model Rules of Professional Conduct for a representation that occurred in 1977). It might thus be said that

to determine whether a standard published after the date of the representation could or should be considered in determining prevailing professional norms, courts should consider whether the standards were intended to be descriptive. Descriptive standards attempt to codify existing norms, while prescriptive standards set out what the organization promulgating the standards believes ought to become the prevailing norms. *Because descriptive standards codify existing norms, they can be applied to representations before or after the date of publication.*

Feldon and Beech, *Unpacking the First Prong of the Strickland Standard* at 21 (emphasis supplied). See also *Ex parte Van Alstyne*, 239 S.W.3d 815, 822 n. 22 (Tex. Crim. App. 2007) (applying both the 2003 ABA

*Guidelines* and the 2006 Texas *Guidelines* to a 2001 trial and conviction.)

The Texas *Guidelines* are descriptive, articulating as they do the duty to investigate for mitigating evidence that was settled and well-established in 1984, when *Strickland* was decided. Thus the Texas *Guidelines* can properly be applied to representations that occurred after 1984 but before the 2006 date of publication. And like the ABA *Guidelines*, the Texas *Guidelines* should be recognized as “guides to determining what is reasonable” in Texas capital cases. *Cf. Wiggins*, 539 U.S. at 524 (citing *Strickland* and further describing the ABA *Guidelines* as “well-defined norms”).



## CONCLUSION

For these reasons, the *Amicus Curiae* the State Bar of Texas, respectfully prays the Court recognize that the 2006 *Guidelines and Standards for Texas Capital Counsel* state the prevailing norms of practice for post-conviction habeas corpus counsel in Texas capital cases.

Respectfully submitted,

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**AMICUS  
CURIAE  
BRIEF**



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No. 11-10189  
CAPITAL CASE

AND  
BRIEF

In The

**Supreme Court of the United States**

CARLOS TREVINO,

*Petitioner,*

v.

RICK THALER, DIRECTOR, TEXAS  
DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,  
*Respondent.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fifth Circuit

**BRIEF OF THE UNIVERSITY OF TEXAS SCHOOL  
OF LAW CAPITAL PUNISHMENT CLINIC  
AND UNIVERSITY OF HOUSTON LAW CENTER  
DEATH PENALTY CLINIC AS AMICI CURIAE  
IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICI CURIAE*

*Amici*<sup>1</sup> are lawyers, legal scholars, and clinical professors who represent death-sentenced Texas clients in post-trial proceedings. We also train Texas law students in the litigation skills required to do such work. We do so by instructing our students concerning the statutory and ethical duties the Texas legislature and the State Bar of Texas impose on lawyers working at different stages in capital litigation. We teach the requirements enforced by the Texas Court of Criminal Appeals ("CCA") for pleading and proving claims related to trial counsel's failure to develop and present mitigating evidence during the penalty phase of a capital trial. Our experience makes us intimately familiar with Texas's dual-track system of post-trial review of capital cases and the framework of legal rules and professional standards governing capital representation. Our specialized knowledge of these practices and institutional arrangements may assist the Court in evaluating whether the equitable considerations that animated

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<sup>1</sup> Consistent with Supreme Court Rule 37.2, counsel for all parties received proper notice of *Amici's* intent to file this *Amicus Curiae* brief and gave their consent. Pursuant to Rule 37.6, the *Amici* confirm that no counsel for any party authored this brief in whole or in part; and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief other than the Clinicians, its members, or its counsel.

*Martinez v. Ryan*, 132 S. Ct. 1309 (2012), should likewise apply to Texas.

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### SUMMARY OF ARGUMENT

The Court should reverse the judgment below and remand for further proceedings on Petitioner's substantive claim of penalty-phase ineffective assistance of trial counsel. His right to review of that claim in federal habeas hinges on whether a death-sentenced Texas prisoner may assert ineffective assistance of state habeas counsel as "cause" to excuse the procedural default of such a claim (a "penalty-phase IATC claim" or "*Wiggins*<sup>2</sup> claim"). This Court recently concluded that, where state habeas is the initial review proceeding in which a prisoner may challenge trial counsel's effectiveness, deficient performance by counsel in that proceeding may constitute "cause." See *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). For *Martinez* purposes, an application for state habeas relief constitutes a Texas prisoner's "initial review proceeding" for a penalty-phase IATC claim. Ineffective assistance by Texas habeas counsel in developing and presenting such a claim should, therefore, be "cause" to excuse any resulting procedural default.

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<sup>2</sup> See *Wiggins v. Smith*, 539 U.S. 510 (2003).

Texas law establishes two, non-redundant proceedings for post-trial review: "direct appeal" and "habeas corpus."<sup>3</sup> Those two tracks serve separate purposes. Through its statutory enactments and professional standards, Texas has imposed correspondingly distinct duties on defense counsel in each track. Taken together, the features of this system compel the conclusion that we have learned through litigating capital cases and that we teach our students daily: *Wiggins* claims can be vindicated only in state habeas corpus proceedings.

*Wiggins* claims require a comprehensive, independent investigation aimed at uncovering potential mitigating evidence. That investigation is necessary to assess trial counsel's performance at the punishment phase. Texas statutes and state bar standards reflect a unitary understanding: habeas counsel, not appellate counsel, must conduct this investigation. Additionally, without first undertaking such an investigation, habeas counsel cannot satisfy the pleading and proof requirements for any penalty-phase IATC claim that a condemned prisoner might advance.

Contrary to the Fifth Circuit's assumptions regarding Texas practice, the investigation and fact development necessary to substantiate a penalty-phase IATC claim in a Texas capital case cannot be

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<sup>3</sup> State habeas corpus proceedings are also called "post-conviction" proceedings; this brief uses those terms interchangeably.

accomplished through a combination of a motion for new trial and the mandatory direct appeal. A motion for new trial must be filed within 30 days and resolved within 75 days of sentencing. Conducting a professionally reasonable investigation into potential mitigating evidence in so little time is a virtual impossibility. For instance, *Wiggins* claims require a careful review of the trial record, but that record is rarely available within the 30-day window for filing a motion for new trial. Further, this Court's key penalty-phase IATC cases—*Williams*, *Wiggins*, *Porter*, *Sears*—all reinforce the conviction that 30 days is insufficient to prepare such claims.

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## ARGUMENT

This Court recently concluded that, where state habeas is the initial review proceeding in which trial counsel's effectiveness may be challenged, deficient performance by habeas counsel in that proceeding may constitute "cause." See *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).<sup>4</sup> Since then, however, the Court of Appeals for the Fifth Circuit has rejected requests to apply *Martinez* to death-sentenced Texas prisoners, reasoning that nothing legally forecloses such a prisoner from attacking his trial counsel's effectiveness in

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<sup>4</sup> *Martinez* thus modified *Coleman v. Thompson*, 501 U.S. 722, 753-754 (1991), which held that errors by counsel in a collateral attack did not constitute "cause."



a motion for new trial and thence on direct appeal rather than in state habeas proceedings. *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012). To resolve the present case, this Court will need to decide whether, under Texas practice, a motion for new trial (and subsequent direct appeal) constitutes the initial review proceeding in a capital case for penalty-phase IATC claims. Our experience—and what we teach our students—is that Texas practice and procedure dictate that penalty-phase IATC claims can be developed only in a habeas proceeding.

**I. ONE ESSENTIAL PART OF REPRESENTING A DEATH-SENTENCED PRISONER IS ASSESSING POTENTIAL PENALTY-PHASE IATC CLAIMS; SUCH CLAIMS REQUIRE A COMPREHENSIVE INVESTIGATION THAT TEXAS PRACTICE CONTEMPLATES HABEAS COUNSEL WILL CONDUCT**

Texas rules governing the available claims for relief, setting relevant time constraints, and providing necessary financial resources make litigating *Wiggins* claims on direct appeal impracticable. Such claims are instead routed into state habeas proceedings. This result is a function of two commands: (1) the explicit directive of the state's criminal court of last resort, the Texas Court of Criminal Appeals ("CCA"); and (2) the statutory duties and the prevailing standard of care for capital habeas counsel, which *require* that counsel conduct a comprehensive, independent investigation into potential mitigating evidence.



Without such an investigation, counsel cannot plead specific facts demonstrating either trial counsel's errors and omissions (deficient performance) or the mitigating evidence that was available, but neither developed nor presented, at trial (prejudice). Adequate extra-record investigation is prerequisite to litigating a viable *Wiggins* claim under Texas practice.

**A. *Amici's* Conviction—That Habeas Is The Lone Forum Available In Texas For Developing Potentially Meritorious Penalty-Phase IATC Claims—Has Long Been Self-Evident To Jurists And State Counsel As Well**

*Amici's* conviction that habeas is the only Texas state-court forum for developing and pursuing penalty-phase IATC claims is borne of experience litigating and teaching capital defense practice. It is not, however, a defense-counsel-specific perspective. Instead, the conviction is a product of practical realities, state court doctrines, and—until now—an understanding accepted by practitioners on both sides of capital cases.

Members of the CCA have explicitly charged post-conviction counsel with responsibility for penalty-phase IATC claims. The only available means to vindicate a substantial penalty-phase IATC claim in Texas is state habeas. Thus when habeas counsel—not appellate counsel—fails to investigate and present a penalty-phase IATC claim, that failure results in a

procedural bar in federal court. *See, e.g., Ex parte Medina*, 361 S.W.3d 633, 647 (Tex. Crim. App. 2011) (Keasler, J., joined by Hervey, J., dissenting on other grounds) (“deficient and inadequate lawyering” in capital habeas proceedings means that “the death-row client’s one opportunity to seek habeas relief is lost,” a forfeiture that “will carry over into the applicant’s federal court habeas proceedings, rendering those proceedings meaningless.”).

Further, the CCA has repeatedly and expressly discouraged the presentation of necessarily undeveloped IATC claims on direct appeal. *See Mata v. State*, 226 S.W.3d 425, 430 n.14 (Tex. Crim. App. 2007) (“As a general rule, one should *not* raise an issue of ineffective assistance of counsel on direct appeal.”) (emphasis retained) (quoting *Jackson v. State*, 877 S.W.2d 768, 772 (Tex. Crim. App. 1994) (Baird, J., concurring)); *see also Mitchell v. State*, 68 S.W.3d 640, 643 (Tex. Crim. App. 2002) (en banc) (“A petition for writ of habeas corpus usually is the appropriate vehicle to investigate ineffective-assistance claims.”) (footnote omitted); *Robinson v. State*, 16 S.W.3d 808, 810 (Tex. Crim. App. 2000) (“a post-conviction writ proceeding, rather than a motion for new trial, is the preferred method for gathering the facts necessary to substantiate” an IATC claim).

This perception on the CCA’s part is nothing new. In 1997, for instance, the CCA described the

“inherently unlikely” odds of mounting any kind of IATC claim on direct appeal:

While expansion of the record may be accomplished in a motion for new trial, that vehicle is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point. Further, mounting an ineffective assistance attack in a motion for new trial is *inherently unlikely* if the trial counsel remains counsel during the time required to file such a motion. Hence, in most ineffective assistance claims, a writ of habeas corpus is essential to gathering the facts necessary to adequately evaluate such claims.

*Ex parte Torres*, 943 S.W.2d 469, 474-75 (Tex. Crim. App. 1997) (en banc) (emphasis added) (citations omitted). As far back as 1980, before basic standards for habeas practice had even emerged, the CCA recognized the insurmountable obstacles associated with trying to bring an IATC claim on direct appeal and the fact that post-conviction constituted the appropriate vehicle:

Experience has taught us that in most instances where the claim of ineffective assistance of counsel is raised, *the record on direct appeal is simply not in a shape*, perhaps because of the very alleged ineffectiveness below, that would adequately reflect the failings of trial counsel. Indeed, in a case such as this, where the alleged derelictions primarily are errors of omission de hors the

record rather than commission revealed in the trial record, collateral attack may be just the vehicle by which a thorough and detailed examination of alleged ineffectiveness may be developed and spread upon a record.

*Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (quoting *Ex parte Duffy*, 607 S.W.2d 507, 513 (Tex. Crim. App. 1980) (en banc)) (emphasis added).<sup>5</sup>

Until quite recently, this conclusion was uncontroversial—even among the state’s own experts in capital litigation. A 2006 publication by the Post-conviction Litigation Division of the Texas Attorney General’s Office is instructive.<sup>6</sup> Purporting to explain capital case procedures to laypersons, it notes that one key reason state habeas “differ[s] from the direct appeal [is] that the defendant [in habeas] may raise claims based on facts outside the trial record (for example, ineffective assistance of trial counsel).”

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<sup>5</sup> See also *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (“A reviewing court will rarely be in a position on direct appeal to fairly evaluate the merits of an ineffective assistance claim.”); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (“A substantial risk of failure accompanies an appellant’s claim of ineffective assistance of counsel on direct appeal. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation.”) (footnote omitted).

<sup>6</sup> *Capital Punishment Appellate Guide Book* (2006), available at [https://www.oag.state.tx.us/AG\\_Publications/pdfs/appellate2006.pdf](https://www.oag.state.tx.us/AG_Publications/pdfs/appellate2006.pdf) (last visited Dec. 17, 2012).

*Capital Punishment Appellate Guide Book* at 5. *Capital Writs*, “an easy-to-use guide for understanding and responding to postconviction writs of habeas corpus in death penalty cases,”<sup>7</sup> published by the Texas District and County Attorneys Association (“TDCAA”), presents the same perspective. *Capital Writs* describes state habeas proceedings as “significantly different from . . . direct appeal” precisely because the latter “are limited to the written, appellate record,” while the former constitute “a hybrid of pre-trial investigation, trial, and appeal,” allowing the defendant to “assert factual, as well as legal, claims.” Roe Wilson, *Capital Writs* 16 (TDCAA 2002) (footnote omitted). For support, *Capital Writs* cites Texas cases holding that IATC claims “cannot usually be adequately examined” on direct appeal. *Id.* at 16 n.1. *See also Robinson*, 16 S.W.3d at 813 n.7 (Tex. Crim. App. 2000) (noting that only in rare cases will the record on direct appeal be sufficient for the reviewing Court to evaluate an IATC claim fairly); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, *pet. ref’d*) (noting that “[a]n appellate court reviews a trial court record” on appeal, and that counsel’s performance “cannot generally be adequately examined based on a trial court record”).

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<sup>7</sup> These descriptive quotations appear in the marketing materials for the manual prepared by the TDCAA available at <http://www.tdcaa.com/publications/capital-writs> (last visited Dec. 17, 2012).



**B. Counsel In The Two, Non-Redundant, Post-Trial Review Proceedings In Texas Capital Cases Are Charged With Correspondingly Different Duties**

Death-sentenced Texas prisoners pursue two simultaneous, post-trial review proceedings with the assistance of counsel. One is an automatic direct appeal to the CCA. Tex. Code Crim. Proc. Ann. art. 37.071 § 2(h) (West 2012) (“The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.”). The other is an application for post-conviction writ of habeas corpus. Tex. Code Crim. Proc. Ann. art. 11.071 (West 2012). Since 1995, Texas capital habeas proceedings have run concurrently with the direct appeal. *Id.* §§ 2, 4(a).

Texas imposes distinct, disjunctive duties on capital appellate and state habeas counsel. The State Bar of Texas’s *Guidelines and Standards for Texas Capital Counsel*, 69 Tex. B.J. 966 (2006) (“Texas Guidelines”), define appellate counsel’s duties as corresponding to the proceeding’s record-bound nature. Accordingly, appellate counsel’s duties include:

- “ensur[ing] that the record is true, correct and complete in all respects,”
- “fully review[ing] the appellate record for all reviewable errors,”
- “preparing a well-researched and drafted appellate brief which conforms with



Court of Criminal Appeals rules and policies,”

- “ensuring that the brief is filed in a timely manner,” and
- “timely notifying the Court of Criminal Appeals [if counsel desires] to present oral argument in the case, if appropriate.”

*Id.* at 976. Appellate counsel has no duty to conduct a factual investigation with regard to the underlying case.

By contrast, a different Texas statutory provision instructs capital habeas counsel to investigate the case “expeditiously,” “before and after the appellate record is filed.” Tex. Code Crim. Proc. Ann. art. 11.071 § 3(a). As described below, the requisite investigation includes an independent, comprehensive mitigation investigation that a claimant could not adequately undertake on the direct appeal track.

### **C. Texas Capital Habeas Counsel Must Undertake A Comprehensive Mitigation Investigation**

All relevant legal and professional rules assign habeas counsel the duty to undertake a comprehensive mitigation investigation. When “[a]uthorities of every stripe” assign this duty to habeas counsel, the conclusion is inescapable that habeas and not direct appeal is the forum for IATC claims. *Cf. Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010) (finding that,

where comparable relevant authorities unanimously required trial counsel to advise her client about the immigration consequences of criminal charges, failing to provide such advice was professionally deficient under the Sixth Amendment). Specifically, the duty to conduct this investigation is embodied in (1) the Texas capital habeas statute; and (2) standards promulgated by the State Bar of Texas.

**1. The Texas capital habeas statute imposes a duty to investigate and provides necessary resources to discharge that responsibility**

Texas's capital habeas statute requires that counsel conduct an extra-record investigation: "On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the [CCA], the factual and legal grounds [for filing] an application for a writ of habeas corpus." Tex. Code Crim. Proc. Ann. art. 11.071 § 3(a); *see also, e.g., Ex parte Reynoso*, 257 S.W.3d 715, 720 n.2 (Tex. Crim. App. 2008) (explaining that counsel appointed under article 11.071 must "diligently pursue the investigation" of potential claims for relief). As members of the CCA recently emphasized, habeas counsel's duty to investigate thoroughly is especially relevant to litigating IATC claims because counsel cannot plead the prejudice that resulted from counsel's deficient performance without "a fact-intensive and exhaustive review of the proceedings as a whole." *Ex parte Medina*, 361 S.W.3d at 648 (Keasler, J., joined by Hervey, J.,

dissenting on other grounds); *see also id.* (emphasizing that the applicant bears “the burden” of “delving into the record, investigating the case, and then formulating [the applicant’s] claims”).

Habeas counsel’s obligation to develop the factual basis for every colorable claim is underscored by article 11.071, section 5(e). That provision dictates that any claim not presented in the initial application, whose factual basis a reasonably diligent investigation would have uncovered, is forfeited. In principle, the evidence necessary to substantiate a *Wiggins* claim may be discovered as soon as trial concludes; as a result, such claims are lost if habeas counsel fails to conduct a complete investigation before filing the initial habeas application.

Habeas counsel’s duty to investigate is not an unfunded mandate. Article 11.071 guarantees payment of all reasonable investigative funding requests. *Id.* § 3(c)-(d). The statute authorizes “prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims.” *Id.* § 3(b). It further authorizes habeas counsel to “incur expenses . . . , including expenses for experts, without prior [court] approval.” *Id.* § 3(d).

**2. Standards promulgated by the State Bar of Texas likewise mandate a comprehensive, independent mitigation investigation by habeas counsel**

Because specific duties are imposed by statute on capital habeas counsel, the Texas Guidelines mandate that counsel conduct a robust investigation of the case. *See generally Texas Guidelines*, 69 Tex. B.J. at 979-81 (Guideline 12.2(B)(3), describing the scope of the requisite investigation). Habeas counsel must treat the proceeding “as both the first and last meaningful opportunity to present new evidence to challenge [the] conviction and sentence.” *Id.* at 976. The Texas Guidelines warn counsel that she “cannot rely on the previously compiled record,” but must conduct a “thorough and independent” inquiry and “should not accept an appointment [if] she is not prepared to undertake the comprehensive extra-record investigation that habeas corpus demands.” *Id.* At the same time, counsel must “obtain and read the entire record of the trial, including all transcripts and motions,” to inform that extra-record inquiry. *Id.* at 979.

The Texas Guidelines also delineate the areas of the client’s personal history that counsel must investigate:<sup>8</sup>

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<sup>8</sup> To facilitate the investigation, the Texas Guidelines instruct habeas counsel to retain, “as soon as possible after appointment,” “an independent mitigation specialist.” 69 Tex. B.J. at 980. The standards specify that the mitigation specialist should be qualified by training and experience to “compile a

(Continued on following page)

- (i.) medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, prenatal and birth trauma, malnutrition, developmental delays, and neurological damage);
- (ii.) family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or

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comprehensive and well-documented psychosocial history of the client." *Id.* Based on this information, the mitigation specialist will perform additional time-consuming and complex tasks to enable habeas counsel to substantiate any potential *Wiggins* claim. For example, the mitigation specialist is expected to analyze the effect of the client's life experiences on his "development, including effect on personality and behavior," "identify the need for assistance from mental health experts," "assist [counsel] in locating [them]," and provide the experts "social history information" to facilitate "competent and reliable evaluations." *Id.* at 980-81. Notwithstanding any tasks delegated to a mitigation specialist, habeas counsel remains ultimately responsible for seeing that the necessary investigation is completed.

religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);

- (iii.) educational history (including achievement, performance, behavior, and activities) and special educational needs (including cognitive limitations and learning disabilities);
- (iv.) military service (including length and type of service, conduct, special training, combat exposure, health and mental health services);
- (v.) employment and training history (including skills and performance, and barriers to employability); and
- (vi.) prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services).

*Id.* at 981.

The mechanics of such an investigation are straightforward: habeas counsel and team must conduct extensive interviews and locate all potentially



relevant documents. The process itself, however, is considerably labor-intensive and time-consuming.<sup>9</sup>

In sum, habeas counsel must “make an independent examination of all of the available evidence—both that which the jury heard and that which it did not—to determine whether the jurors made a fully informed resolution of the issues at . . . punishment.” *Id.* at 980. These standards reflect the State’s statutory mandates and thus a unitary understanding: habeas counsel, not appellate counsel, must conduct a thorough mitigation investigation.

**D. Texas Capital Habeas Counsel Must Plead Specific Factual Allegations That Would Warrant Relief And Support Those Allegations With All Evidence Necessary To Obtain Relief**

As we teach our students, a habeas application that omits the precise factual basis for relief is deficient

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<sup>9</sup> Potential witnesses who must be interviewed include “[the] client’s family members (who may suffer from some of the same impairments as the client),” as well as others who knew the client and his family. *Id.* at 981. Habeas counsel must also pursue “confidential records” relating to all potentially relevant information about the capital client, his or her siblings and parents, and other family members.” *Id.* Such documents may include “school records, social service and welfare records, juvenile dependency or family court records, medical records, military records, employment records, criminal and correctional records, family birth, marriage, and death records, alcohol and drug abuse assessment or treatment records, and U.S. Bureau of Citizenship and Immigration Services records.” *Id.*

under Texas law. “[T]here are clear statutory requirements for [habeas] applications to allege the facts which must be proved by evidence.” *Ex parte Medina*, 361 S.W.3d at 639, *see id.* at 640 (reiterating the “long held” rule that a habeas application “must contain sufficient specific facts that, if proven to be true, might entitle the applicant to relief”). This point of Texas law is so fundamental that the State rightly conceded in *Medina* that a document is not a “proper [habeas] application” unless it “set[s] out specific facts” or “contain[s] . . . exhibits, affidavits, or a memorandum of law [alleging] specific facts.” *Id.* at 635.

*Medina* illustrates how this principle applies to *Wiggins* claims. Medina’s habeas counsel filed a four-page pleading that listed ten bases for relief, each of which purported to “allege ineffective assistance of either trial or appellate counsel,” but “merely stat[ed] factual and legal conclusions.” *Id.* at 635. The CCA held that the document was not a proper habeas application. *Id.* at 640. The otherwise “perfectly appropriate legal claim”—that Medina’s trial counsel had unreasonably failed to secure the attendance of necessary defense witnesses for the punishment phase—failed because the habeas application lacked a sufficient factual basis. *Id.* As the Court explained:

[H]abeas counsel fails to provide any facts that would support that claim: What necessary witnesses? What would they have testified to? What means did trial counsel use to procure their attendance? Why were these means constitutionally insufficient? What

other means were available? Why were those means constitutionally necessary under the circumstances? How, if at all, was applicant harmed?

*Id.* at 640-41 (footnotes omitted). Because Medina's habeas counsel failed to plead the requisite factual bases for his client's claims, the filing did not constitute a proper habeas application: "A writ application must be complete on its face. It must allege specific facts so that anyone reading [it] would understand precisely the factual basis for the legal claim." *Id.* at 641.

Factual development *must* precede the filing of a habeas application—even though some further factual development may ensue. That is, once the State has answered an application, a trial court faced with "controverted, previously unresolved factual issues" may require the parties to submit additional evidence before resolving those issues. Tex. Code Crim. Proc. Ann. art. 11.071 § 9(a) (trial court may employ "affidavits, depositions, interrogatories, and evidentiary hearings" to settle factual disputes). "But the fact issues that must be resolved *are those contained within the writ application* and the State's controverting answer. Without specific facts, factual contentions, and factual issues set out in the application, the convicting court has nothing to resolve." *Ex parte Medina*, 361 S.W.3d at 642 (emphasis added). Consequently, the other mechanisms that article 11.071 makes available for developing the facts cannot save habeas counsel from the consequences of failing to conduct a

thorough investigation of the relevant facts *before* filing the initial application.

Representing a prisoner who has been sentenced to death in Texas, without running afoul of the Sixth Amendment, requires that counsel assess potential penalty-phase IATC claims. These claims will be deemed deficient if the application does not include specific, substantiated factual allegations supporting the request for relief. Habeas counsel cannot provide the required factual support without first conducting a comprehensive investigation—particularly with regard to mitigating evidence.

## **II. THE TEXAS MOTION FOR NEW TRIAL/DIRECT APPEAL PROCEDURES CANNOT ACCOMMODATE THE FACT-DEVELOPMENT TASKS ESSENTIAL TO SUBSTANTIATING A WIGGINS CLAIM**

Recently, the Court of Appeals for the Fifth Circuit decided that *Martinez* will not apply in Texas, relying on a rationale at odds with the realities of practice. *See Ibarra*, 687 F.3d at 227. The Fifth Circuit reasoned that Texas defendants may “raise ineffectiveness claims before the trial court following conviction via a motion for new trial,” and then “pursue the denial of [that] claim through direct appeal”; as a result, “both Texas intermediate [appellate] courts and the [CCA] sometimes reach the merits of ineffectiveness claims on direct appeal.” *Id.* *Ibarra* was correct insofar as it observed that Texas

law does not *forbid* a capital defendant from attempting to present a penalty-phase IATC claim in a motion for new trial. It is also true that a capital defendant who loses such a motion may seek review of that denial in a direct appeal to the CCA. For several reasons, however, the motion for new trial/direct appeal procedures available in Texas cannot accommodate the fact-development tasks required of habeas counsel that are essential to substantiating a *Wiggins* claim.

**A. Texas Law Requires That A Motion For New Trial Be Filed Within Thirty Days; This Makes It Impracticable For Defense Counsel To Complete The Investigation And Other Fact Development Essential To Successfully Litigating A Penalty-Phase IATC Claim**

In Texas, any convicted defendant—capital or non-capital—who wishes to file a motion for new trial must do so within 30 days after the trial court imposes or suspends sentence. Tex. R. App. P. 21.4(a). While an original motion for new trial may be amended, any such amendment likewise must be filed within this same 30-day period. Tex. R. App. P. 21.4(b).

Texas law requires the disposition of a motion for new trial—including any hearing on the motion and the trial court's ruling on the merits—to occur within a 75-day window. *See* Tex. R. App. P. 21.6 (requiring defendant to “present” a motion for new trial to the trial court within 10 days of filing it, “unless [that]



court in its discretion permits it to be presented and heard within 75 days from the date when the court imposes or suspends sentence in open court"); Tex. R. App. P. 21.8(a) (limiting the time for trial courts to rule on the motion to the same 75-day window). Any motion for new trial that the court does not rule upon within this period is overruled by operation of law. Tex. R. App. P. 21.8(c) (stating that motion for new trial "not timely ruled on by written order will be deemed denied when [this 75-day period] expires").

Nothing in Texas law allows a trial court to modify or extend the deadlines that govern a motion for new trial in capital cases. While a trial court may consider an amendment to a motion for new trial made outside the initial 30-day window—at least where an original motion was timely filed and the State does not object to the untimeliness of the amended motion—the CCA has emphasized that Rule 21.8(a)'s 75-day limit marks an absolute boundary to the trial court's authority concerning any motion for new trial, whether original or amended. *See State v. Moore*, 225 S.W.3d 556, 569 (Tex. Crim. App. 2007) (holding that the rules prohibit a defendant from filing an amended motion for new trial more than 30 days after sentence is imposed or suspended in open court, yet trial court retains authority to rule on a tardy amendment, at least absent objection from the state, but only within the 75-day window). If that deadline passes without entry of a written order disposing of the motion, Rule 21.8(c) is triggered, and



“the trial court loses jurisdiction” to enter a ruling. *Id.* at 566-67 (citations omitted).

As explained below, this inflexible framework—requiring that a motion for new trial be filed within 30 days and resolved within 75—does not provide sufficient time for defense counsel to assess whether a *Wiggins* claim is available or to substantiate such a claim through investigation and other fact development.<sup>10</sup>

- 1. Reviewing the trial record is essential to assessing a potential *Wiggins* claim; but that record is rarely available within the narrow window for filing a motion for new trial**

As detailed above, discovering and developing facts outside the trial record is the hallmark of effective defense advocacy in post-conviction proceedings

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<sup>10</sup> Texas law also recognizes an alternative post-trial motion, the “motion in arrest of judgment,” defined as an “oral or written suggestion that, for reasons stated in the motion, the judgment rendered against the defendant was contrary to law.” Tex. R. App. P. 22.1. This language might conceivably cover a *Wiggins* claim. The time deadlines for filing and resolving a motion in arrest of judgment are, however, exactly the same as those for a motion for new trial. Therefore, the former is no better a vehicle for litigating such a challenge than the latter. See Tex. R. App. P. 22.3 (requiring that a motion in arrest of judgment be filed within 30 days after sentencing); Tex. R. App. P. 22.4 (requiring the trial court to rule on such a motion within 75 days after sentencing; after this period expires, any pending motion in arrest of judgment is deemed denied).

that raise potentially meritorious penalty-phase IATC claims. Those tasks cannot be accomplished without first carefully reviewing the trial record. To assess whether trial counsel's performance satisfied applicable professional norms, habeas counsel must determine how trial counsel approached the duty to present a case in accordance with a mitigation theory and what mitigation case was actually presented and argued at trial. Further, habeas counsel needs a detailed understanding of the "mix" of mitigation and aggravation presented at trial to appreciate how any deficiencies in trial counsel's performance may have affected the verdict. At a minimum, then, no lawyer can advance a penalty-phase IATC claim in a motion for new trial due 30 days after sentencing without first reviewing the actual trial record with great care.

The trial record, however, is rarely available within 30 days after sentence is imposed.

Accordingly, for the Fifth Circuit's view of *Martinez* to be correct, one has to assume two unlikely probabilities: (1) that the record became available in expedited fashion, then, (2) that defense counsel had an adequate opportunity to review that record within the same window. Yet the CCA itself has essentially recognized this nigh impossibility, observing that one of "the inadequacies of direct appeal in evaluating ineffective assistance claims" is that "the trial record has generally not been transcribed" by the 30-day deadline to move for a new trial. *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (en banc).

Short delays in producing the trial record are understandable, as Texas capital trial records typically run to hundreds or even thousands of pages of transcripts and exhibits, plus potentially hundreds of pages of pleadings and orders. Any delay, however, is harmful to counsel facing an absolute 30-day deadline. Even given high-tech improvements in electronic transcription, an entire trial record is unlikely to ever be available immediately after sentence is imposed.

Even if the entire trial record in a capital trial *were* available on the very day that the sentence was imposed, that would not solve the problem. Defense counsel simply cannot complete a review of the record with an eye toward whether it reveals a prospective *Wiggins* claim in a mere 30 days. And, as discussed above, that review itself simply sets the stage for the complex and time-consuming task of investigating potential mitigating evidence—a job involving many moving parts that likewise cannot be done in 30 days.

**2. Thirty days is not sufficient to complete the “independent, comprehensive mitigation investigation” that Texas practice requires as part of deciding whether to advance a *Wiggins* claim**

To evaluate whether the defendant has a potentially meritorious penalty-phase IATC claim, defense counsel must pursue an “independent, comprehensive mitigation investigation” that mirrors the prevailing standard of practice for trial representation. See

Section I, *supra*. This inquiry must encompass a wide range of areas because, under the prevailing standard of practice, trial counsel “must fully investigate any and all potential mitigating circumstances in his client’s background which might conceivably persuade a jury not to impose the death penalty,” even if the defendant is “uninterested in helping” or even “actively obstruct[s]” counsel’s efforts to develop a mitigation defense. *Ex parte Gonzales*, 204 S.W.3d 391, 400 (Tex. Crim. App. 2006) (Cochran, J., concurring) (citations omitted). Often, in addition to interviewing lay witnesses and collecting documents, developing a mitigation case to support a *Wiggins* claim requires seeking the assistance of multiple experts (*e.g.*, mental health specialists, such as neuropsychologists or psychiatrists). *See, e.g., Sears v. Upton*, 130 S. Ct. 3259, 3262 (2010) (*per curiam*) (involving affidavits from “two different psychological experts,” one a medical doctor and the other a Ph.D., submitted for the first time in state post-conviction proceedings); *Porter v. McCollum*, 130 S. Ct. 447, 451 (2009) (involving testimony of “an expert in neuropsychology . . . who had examined [the defendant] and administered a number of psychological assessments” for the first time in state post-conviction proceedings). Simply locating an appropriately qualified expert who is available to provide reasonably necessary services can easily consume the entire 30 days that would be available for filing a motion for new trial in Texas. Even if defense counsel were able to identify an expert within that period, it would be nearly impossible to arrange for the expert to conduct the necessary

evaluation(s) and consultation(s) before the end of the fixed 75-day window for all proceedings on such a motion.

For all these reasons, the 30-day period allotted by Tex. R. App. P. 21.4 for preparing and filing a motion for new trial is plainly insufficient for defense counsel to complete the comprehensive investigation and ancillary fact development that is necessary.

Our perspective here is not idiosyncratic. The deadlines established by statute for filing a condemned prisoner's application for post-conviction habeas corpus relief reflect a similar understanding. Such an application must be filed within 180 days after habeas counsel is appointed by the trial court, or within 45 days after the State's direct appeal brief is filed, whichever is later. Tex. Code Crim. Proc. Ann. art. 11.071 § 4(a). For good cause, this initial deadline may be extended once, for 90 additional days. *Id.* § 4(b). Once the State files its answer, the statute affords additional time for the trial court to consider and dispose of the matter, which can range from 65 to 155 days (depending on whether factual disputes must be resolved). *See id.* §§ 8-9. These more expansive time deadlines are consistent with the settled expectation in Texas that penalty-phase IATC claims, because they cannot be developed without wide-ranging investigation into matters outside the record, will be litigated in state habeas proceedings. Additionally, these deadlines support the view that such claims cannot, as a practical matter, be substantiated by defense counsel within 30 days, and then heard



and resolved by the court within another 45, as would be required if they were pursued through a motion for new trial.

**3. This Court's IATC jurisprudence reinforces the fact that thirty days is grossly insufficient to prepare a penalty-phase IATC claim**

No lawyer working within the Texas framework could prepare a penalty-phase IATC claim on direct appeal comparable to those that have prevailed before this Court. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Porter v. McCollum*, 130 S. Ct. 447, 451 (2009); and *Sears v. Upton*, 130 S. Ct. 3259, 3262 (2010) (per curiam). In each of these cases, post-conviction attorneys spent countless hours performing the tasks that Texas assigns to habeas counsel: reviewing the trial record, investigating the defendant's background and circumstances, contacting and enlisting experts, and documenting the type of mitigation case that could and should have been undertaken for trial. This Court's opinions have contrasted the paltry mitigation record developed by counsel at trial to the robust record developed during the post-conviction proceeding. By examining the gulf between the fact development at trial and post-conviction, the Court was able to make an informed assessment of trial counsel's performance and resulting prejudice. Yet developing the kind of record that enables a legitimate comparison between (1) what trial counsel



did and (2) what trial counsel should have done, but did not do, requires substantial time and resources, as illustrated above. Without those substantial resources to develop the *basis* for such a comparison, the petitioners in this Court's most significant recent IATC cases would have been unable to present the Court with the factual record that enabled those petitioners to prevail. Similarly situated petitioners would have virtually no ability to develop the requisite record on direct appeal within the constraints imposed by Texas practice and procedure.

**a. *Williams* required a substantial post-conviction investigation**

In *Williams*, this Court held that the petitioner's right to the effective assistance of trial counsel had been violated *because of* trial counsel's "failure to discover and present . . . significant mitigating evidence[.]" 529 U.S. at 371. The Court reached that conclusion by first looking at the evidence Williams' trial counsel had offered during his initial sentencing. *Id.* at 369. During that proceeding, trial counsel had offered only the following:

- the testimony of Williams' mother;
- the testimony of two neighbors—one of whom was sitting in the audience during the sentencing proceeding when trial counsel decided on a whim to call her to the stand; and

- “a taped excerpt” from a statement made by a psychiatrist.

*Id.* As this Court noted, the live witnesses did little more than attest that Williams was a “nice boy,” while the psychiatrist on tape repeated a brief statement Williams himself had allegedly made about how, before perpetrating a different crime, he had removed the bullets from a gun “so as not to injure anyone.” *Id.*

After cataloguing the scant mitigating evidence offered at trial, this Court compared that evidence to the record developed during a state post-conviction proceeding. It noted that the latter included, but was not limited to, the following significant evidence “that had not been presented at trial”:

- documents related to Williams’ commitment to a mental institution at age eleven;
- evidence of pronounced “mistreatment, abuse, and neglect during his early childhood”;
- testimony that he was “borderline mentally retarded” and might have organic brain impairments; and
- admissions by the state’s experts at trial that Williams would *not* pose a danger to society if he were kept in a “structured environment.”

*Id.* at 370. This Court also noted that the federal habeas judge identified “five categories of mitigating evidence” that Williams’ trial counsel had failed to introduce. See *id.* at 372 n.4. These assessments would not have been possible without the extensive efforts of post-conviction counsel along three dimensions: (1) completing the extensive legwork that trial counsel had neglected to do; (2) assessing whether the investigation yielded evidence fruitful to a mitigation case that had not been put on; and then (3) assessing what, if any, explanation trial counsel had for failing to pursue this investigation in the first instance. This multi-step process would be impossible on direct appeal under current Texas practice.

**b. *Wiggins* required a substantial post-conviction investigation**

In *Wiggins*, this Court decided that the pre-sentencing investigation that had purportedly convinced trial counsel not to put on a vigorous mitigation case<sup>11</sup> was so unreasonable as to be deficient under *Strickland*. 539 U.S. at 523, 534. The Court reached this conclusion by comparing the limited materials trial counsel considered in deciding on a mitigation strategy to the overwhelming evidence of Wiggins’ “unfortunate life history” uncovered during post-conviction proceedings

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<sup>11</sup> The sentencing jury, as this Court explained, heard evidence related to only one mitigating factor: “that Wiggins had no prior convictions.” 539 U.S. at 537.

several years later. 539 U.S. at 514-17. The trial court record had only included the following:

- a psychologist's report based on an IQ and personality tests that "revealed nothing, however, of petitioner's life history";
- a PSI with "a one-page account of Wiggins' 'personal history'" that was essentially devoid of specifics;
- some records from the Baltimore Department of Social Services showing that Wiggins had been placed in various foster homes as a child—but without any details of the unmitigated horror he had experienced while in the system.

*Id.* at 523. The Court compared these scant materials to the evidence later uncovered during post-conviction, much of which was developed by a licensed social worker based on "an elaborate social history report he had prepared." *Id.* at 516. That report was the product of a significant post-conviction investigation of "state social services, medical, and school records" and "interviews with petitioner and numerous family members." *Id.* These materials revealed numerous mitigating facts, including:

- information about the first six years of Wiggin's life with a chronic alcoholic mother who left her children alone for days without food such that they were forced to subsist on "paint chips and garbage," who "had sex with men while her children slept in the same bed," and

“forced [Wiggins’] hand against a hot stove burner,” which required hospitalization;

- records indicating that, starting at age six, Wiggins “was shuttled from foster home to foster home,” where he was physically and sexually abused;
- school records indicating “frequent, lengthy absences”;
- evidence that he ran away at sixteen and “began living on the streets,” and that, upon intermittently returning to the foster system, he was subjected to additional instances of sexual assault, including gang rape; and
- evidence of Wiggins’ “diminished mental capabilities.”

*Id.* at 517-18, 525, 535. The evidence that permitted the post-conviction expert to prepare his voluminous report required extensive effort to uncover. Moreover, this Court was able to see the “troubled background” that trial counsel had failed to unearth, and thus had failed to present to the sentencing jury, only because post-conviction counsel had the time and resources to conduct a thorough investigation. *See id.* at 532-34. Again, had *Wiggins* arisen in Texas, no lawyer working within the confines of Texas practice could have developed the record necessary to expose Kevin Wiggins’ LATC claim on direct appeal.

**c. Porter required a substantial post-conviction investigation**

In *Porter*, this Court explained that the proper way to adjudicate *Wiggins* claims requires “consider[ing] the *totality of the available mitigation evidence*—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[hing] it against the evidence in aggravation.” 130 S. Ct. at 453-54 (emphasis added) (citation omitted). At trial, Porter’s counsel’s mitigation case consisted of “put[ting] on only one witness, Porter’s ex-wife, and read[ing] an excerpt from a deposition.” *Id.* at 449. He put on no evidence related to Porter’s mental health. *Id.* By contrast, Porter’s post-conviction counsel “presented extensive mitigating evidence, all of which was apparently unknown to his” trial counsel. *Id.* The post-conviction record included evidence of:

- his abusive childhood chronicled in post-conviction depositions taken of his siblings that noted, for instance, how his father had beaten his mother routinely, once so severely that she was hospitalized and miscarried, and how he had frequently targeted Porter as well, particularly when he “tried to protect his mother”;
- his struggles in school that led to his dropping out at twelve or thirteen;
- a “commanding officer’s moving description” of the role Porter, a decorated Korean War veteran, played in two battles



and other ample documentation of his heroic military service;

- his post-traumatic stress syndrome;
- his impaired mental health and mental capacity assessed by an expert in neuropsychology; and
- his long-term substance abuse as a means to cope with his mental health issues.

*Id.* at 448-52. This extensive mitigation case, which permitted George Porter to prove his penalty-phase IATC claim, could not have been developed during the narrow window Texas counsel are afforded to file motions for new trial and to pursue direct appeals in capital cases.

#### **d. *Sears* required a substantial post-conviction investigation**

In *Sears*, this Court found that “the face of the state court’s opinion” made “plain” that the state court had “failed to apply the correct prejudice inquiry” in adjudicating Demarcus Sears’ penalty-phase IATC claim. 130 S. Ct. at 3261. The Court noted that a vast amount of mitigating evidence “emerged only during state postconviction relief” because trial counsel had “failed to conduct an adequate mitigation investigation.” *Id.* at 3264.

The Court identified at least seven affidavits and extensive reports based on “hours of interviews,

testing, and observation” from “well-credentialed” experts. *Id.* at 3263. The Court also observed that the post-conviction record amounted to “22 volumes of evidentiary hearing transcripts and submissions” documenting the results of a thorough post-conviction investigation conducted on Sears’ behalf. *Id.* at 3266 n.12. This evidence revealed, for instance:

- Sears’ performing “at or below the bottom first percentile in several measures of cognitive functioning and reasoning”;
- Sears’ “significant frontal lobe abnormalities”;
- his parents’ “physically abusive relationship” and turbulent divorce;
- sexual abuse of Sears perpetrated by a male cousin;
- his parents’ verbal and emotional abuse attested to by the family doctor, teachers, and other family members; and
- how Sears’ older brother, a convicted drug dealer and user, had “introduced Sears to a life of crime.”

*Id.* at 3262-63. The Court was able to conclude that trial counsel’s investigation was constitutionally inadequate only *because of* the extensive post-conviction record. That record permitted the Court to realize just how deficient trial counsel had been when, during sentencing, he had described Sears’ childhood “as stable, loving, and essentially without

incident.” *Id.* at 3261. Had Sears’ claim arisen in Texas, counsel would have been incapable of amassing the copious evidence during the time allotted to pursue a motion for new trial on direct appeal that was developed during the state post-conviction process; yet that evidence is what this Court found sufficiently compelling to warrant relief.

In short, Texas counsel cannot follow this Court’s mandates regarding penalty-phase IATC claims without the benefit of a thorough post-conviction mitigation investigation. Had Williams, Wiggins, Porter, or Sears pursued a penalty-phase IATC claim in Texas on direct appeal, they would have lost—because their counsel would not have been able to perform the essential mitigation investigation needed to prove such claims.

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## CONCLUSION

*Amici’s* experience litigating capital cases has led us to conclude that, in Texas, the only feasible vehicle for litigating a penalty-phase IATC claim is an application for state habeas relief, not a motion for new trial coupled with an ensuing direct appeal. This is what we teach the law students in our clinics. For *Martinez* purposes, an application for state habeas relief constitutes the “initial review proceeding” for a penalty-phase IATC claim by a Texas prisoner. Ineffective assistance by Texas habeas counsel in developing and presenting such a claim should, therefore, be

"cause" to excuse any resulting procedural default of that penalty-phase IATC claim in federal habeas.

For the foregoing reasons, the Court should reverse the judgment below and remand for further proceedings on Petitioner's penalty-phase IATC claim.

Respectfully submitted,

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**AMICUS  
CURIAE  
BRIEF**

No. 11-10189

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**In the Supreme Court of the United States**

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CARLOS TREVINO,

*Petitioner,*

v.

RICK THALER, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent.*

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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**BRIEF OF AMICI CURIAE UTAH  
AND 24 OTHER STATES  
IN SUPPORT OF RESPONDENT**

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## QUESTION PRESENTED

In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), this Court held that “[w]hen a State *requires* a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of [that] claim” where no counsel was provided or counsel in the collateral proceeding was ineffective. *Id.* at 1318 (emphasis added). The question presented here is as follows:

Whether the rule of *Martinez* extends to ineffective-assistance-of-trial-counsel claims raised in States that do not require all such claims to be brought in collateral proceedings.

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## INTEREST OF *AMICI CURIAE*

One of the States' core functions is to protect their residents by obtaining state-court convictions and defending those convictions against federal habeas corpus challenges. A core principle of federal habeas corpus law is that state prisoners must exhaust their claims in state court before they may assert them in a federal habeas proceeding. A concomitant principle is that the ineffectiveness of the prisoner's counsel is not "cause" that would excuse the prisoner's procedural default of a claim unless counsel's ineffectiveness constitutes a violation of the prisoner's constitutional right to counsel.

In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), this Court crafted a narrow exception to that rule, applicable by its terms to the handful of States, such as Arizona, that require prisoners to bring all claims of ineffectiveness of trial counsel in collateral proceedings. At issue in this case is whether *Martinez* extends to the vast majority of States that, unlike Arizona, do not channel all ineffectiveness-assistance claims to collateral proceedings. The resolution of that question will affect the outcome of thousands of federal habeas proceedings nationwide and could effectively compel many States to provide state-collateral-review counsel where previously they had not. The amici States therefore have a substantial interest in the outcome of this case.

## SUMMARY OF ARGUMENT

This Court did not adopt a sweeping new rule in *Martinez v. Ryan*. Rather, it adopted a "limited" exception to the general rule, established in *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991), that attorney error provides cause to excuse a procedural default only when that error constitutes a violation of the prisoner's constitutional right to counsel. 132 S. Ct. at 1320. The "limited nature of the qualification to *Coleman* . . . reflects . . . Arizona's decision to bar defendants from raising ineffective-assistance claims on direct appeal." *Ibid.* *Martinez* time and again points to that feature of Arizona law.

Only five other States also "bar defendants from raising ineffective-assistance claims on direct appeal." The vast majority of the remaining 44 States hear some ineffective-assistance claims on direct appeal and other ineffective-assistance claims on collateral review. Petitioner would have this Court extend *Martinez* from a limited exception applicable to a handful of States to a far-reaching exception applicable to virtually every State. This Court should hesitate before taking that momentous step.

In the few States in which it applies, *Martinez* constitutes a sea change in habeas law that undermines AEDPA by creating a large new category of claims that can be heard on federal habeas review yet are not subject to deferential review under 28 U.S.C. §2254(d) and the attendant limits on evidentiary hearings. Nor can States remedy that problem by providing counsel in all collateral proceedings. *Martinez*, of course, applies even when prisoners were represented by counsel during those proceedings. And channeling



state resources to collateral counsel and “*Martinez* cause” hearings leaves fewer funds for other services such as indigent defense.

*Martinez* also makes it more likely that ineffective-assistance claims will be first heard during federal habeas review — long after trial, when the reasons underlying counsel’s many tactical decisions are a dim memory. Many prisoners and their counsel will bypass a state court perceived as unfriendly so that their ineffective-assistance claims can be heard *de novo* by a federal court.

We are not suggesting that *Martinez* be revisited; just that it not be extended so quickly beyond its express boundaries. *Martinez* was an exercise of this Court’s equitable judgment; and equitable powers are best exercised in an evolutionary, not revolutionary, manner.

## ARGUMENT

### **I. The Large Majority of States, Like Texas, Are Not Covered by *Martinez*’s Express Holding.**

#### **A. Before *Martinez*, the uniform nationwide rule was that ineffective assistance of collateral counsel did not excuse a prisoner’s procedural default.**

Prior to *Martinez*, the relevant law was crystalline. Under the procedural-default doctrine, a federal habeas court generally “will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule.” 132 S. Ct. at 1316. A

prisoner may overcome that bar if he “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.” *Coleman*, 501 U.S. at 750. Ordinary attorney error, however, does not qualify as “cause” because the prisoner bears the risk of error by his agent (his counsel). *Id.* at 753-54. Only when counsel’s error “constitutes a violation of petitioner’s right to counsel” does attorney error provide cause to excuse a procedural default. *Id.* at 754.

That could never occur with respect to collateral-review counsel because in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), this Court held that prisoners do not “have a constitutional right to counsel when mounting collateral attacks upon their convictions.” *Id.* at 555. See also *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (applying same rule to capital cases). States therefore did not have to provide collateral counsel, did not have to hold collateral counsel they did provide to Sixth Amendment standards, and — most relevant here — could not be forced to defend on federal habeas any claims that a prisoner procedurally defaulted on collateral review on the ground that competent counsel would have properly asserted those claims.

It is true, as *Martinez* noted, that *Coleman* did not specifically address attorney errors in state collateral proceedings that provided the first occasion at which a prisoner could present a claim of ineffective assistance of trial counsel. 132 S. Ct. at 1316. But the general rule announced in *Coleman* encompassed that situation. For that reason, federal courts nationwide uniformly applied *Coleman* to “initial-review collateral proceedings.” See *Mackall v. Angelone*, 131 F.3d 442, 449 & n.13 (4<sup>th</sup> Cir. 1997) (en banc) (refusing to carve out exception to *Coleman* and finding that none of the

other court of appeals to address the issue had either), *cert. denied*, 522 U.S. 1100 (1998). Ineffectiveness of collateral counsel or a State's failure to provide such counsel, in initial-review proceedings or otherwise, did not provide cause to excuse procedural defaults. And States were not put to the choice of providing such counsel or allowing federal habeas courts to hear, *de novo* and without any prior state court review, ineffective-assistance-of-trial-counsel claims.

**B. *Martinez* modified that rule in States that bar direct appeals of all ineffective-assistance-of-counsel-claims.**

*Martinez* crafted a "limited qualification to *Coleman*." 132 S. Ct. at 1319. The case involved a prisoner in a State, Arizona, that "does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review." *Id.* at 1313. As a consequence, "collateral proceedings" in Arizona "provide the first occasion to raise a claim of ineffective assistance at trial." *Id.* at 1315. The Court dubbed such proceedings "initial-review proceedings" and held that the ineffectiveness or absence of counsel in such proceedings can serve as "cause" to excuse a procedural default. *Id.* at 1316-18.

This Court generally does not decide issues not squarely before it, see *Egelhoff v. Egelhoff*, 532 U.S. 141, 152 (2001), and *Martinez* was no exception. The decision carefully limited its analysis and holding to collateral proceedings in States that bar ineffective-assistance claims from being brought on direct review. See, e.g.:

- "Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner

to raise a claim of ineffective assistance of counsel at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 1317.

- "[W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim" when counsel is not provided or is ineffective. *Id.* at 1318.
- "[T]he limited nature of the qualification to *Coleman* adopted here reflects . . . Arizona's decision to bar defendants from raising ineffective-assistance claims on direct appeal." *Id.* at 1320.
- "Our holding here addresses only the constitutional claims presented in this case, where the State barred the defendant from raising the claims on direct appeal." *Ibid.*

The Court thus concluded, "Where, under state law, claims of ineffective assistance of trial counsel *must* be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Ibid.* (emphasis added).

By its terms, therefore, *Martinez* established a new habeas rule for Arizona and States that, like Arizona, "do[ ] not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review." 132 S. Ct. at 1313. Petitioner concedes as much when he argues, not that *Martinez* directly controls, but that "the rationales this Court

relied on in *Martinez* apply with equal force to the Texas system." Pet. Br. 34. As explained in Section II, the reasoning of *Martinez* does *not* extend to States with systems different than Arizona's. More important for now, though, is the incontestable fact that Petitioner is seeking an extension of *Martinez*.

**C. The vast majority of States do not bar direct appeals of all ineffective-assistance-of-counsel claims.**

The extension of *Martinez* sought by Petitioner is enormous. *Martinez* only directly applies to Arizona and the five other States (Maine, Missouri, Oregon, Rhode Island, and Virginia) that also bar all direct appeals of ineffective-assistance claims.<sup>1</sup> And *Martinez* would appear to have no relevance in Michigan, which requires all ineffective-assistance claims to be brought on direct appeal.<sup>2</sup>

Whether *Martinez* applies to the remaining 43 States is an open question. Although no two state post-conviction processes are identical, with all having state-specific nuances, the States can roughly be categorized as follows.

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<sup>1</sup> Me.: *State v. Nichols*, 698 A.2d 521, 522 (Me. 1997). Mo.: Mo. Sup. Ct. R. 29.15; *Tisius v. State*, 183 S.W.3d 207, 211 (Mo. 2006). Or.: *State v. Chase*, 624 P.2d 1100, 1101 (Or. Ct. App. 1981). R.I.: *State v. Malstrom*, 672 A.2d 448, 450 (R.I. 1996). Va.: *Hall v. Commonwealth*, 515 S.E.2d 343, 347 (Va. Ct. App. 1999).

<sup>2</sup> Mich.: *People v. Ginther*, 212 N.W.2d 922, 926 (Mich. 1973) (establishing procedure allowing trial court, during direct appeal, to hold evidentiary hearing to develop record needed to pursue ineffective-assistance claim).



Eleven States, including Texas, permit a convicted defendant to file a motion for new trial based on the ineffectiveness of trial counsel, which he can support by developing an evidentiary record.<sup>3</sup> The state appellate courts can later review the denial of that claim on direct appeal.<sup>4</sup> Prisoners in most of those States also have the option of instituting a collateral proceeding to develop a record to support an ineffective-assistance

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<sup>3</sup> Ala.: *Ex parte Ingram*, 675 So. 2d 863, 865 (Ala. 1996). Ark.: *Rounsaville v. State*, 288 S.W.3d 213, 217 (Ark. 2008). Cal.: *People v. Fosselman*, 659 P.2d 1144, 1150 (Cal. 1983). Ill.: *People v. Krankel*, 464 N.E.2d 1045, 1049 (Ill. 1984). Ky.: *Humphrey v. Commonwealth*, 962 S.W.2d 870, 872-73 (Ky. 1998); *Wilson v. Commonwealth*, 601 S.W.2d 280, 284 (Ky. 1980). La.: *State v. Ratcliff*, 416 So. 2d 528, 530 (La. 1982); *State v. Hayes*, 16 So. 3d 604, 609 (La. Ct. App. 2009) ("a motion for new trial is also an accepted vehicle by which to raise [an ineffective-assistance] claim"); but see *State v. Decay*, 989 So. 2d 132, 148 (La. Ct. App. 2008) (stating that ineffective-assistance claim "does not appear to fall under any of the five enumerated grounds for new trial"). Mass.: *Commonwealth v. Williams*, 861 N.E.2d 784, 786 (Mass. Ct. App. 2007). Pa.: *Commonwealth v. Bomar*, 826 A.2d 831, 853-54 (Pa. 2003) (noting that ineffective-assistance claims can be addressed in some instance in new trial motion, though that is not "common"). Tenn.: *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001). Wis.: *State v. Evans*, 682 N.W.2d 784, 793-95 (Wis. 2004) (describing motion for postconviction relief, which is reviewed on direct appeal).

<sup>4</sup> Ala.: *Ex parte Ingram*, 675 So. 2d at 865. Ark.: *Rounsaville*, 288 S.W.3d at 217. Cal.: *People v. Callahan*, 21 Cal. Rptr. 3d 226, 234 (Cal. Ct. App. 2004). Ill.: *Krankel*, 464 N.E.2d at 1049. Kan.: *Rice v. State*, 154 P.3d 537, 541 (Kan. Ct. App. 2007). Ky.: *Humphrey*, 962 S.W.2d at 872-73. La.: *Ratcliff*, 416 So. 2d at 530. Mass.: *Commonwealth v. Montgomery*, 759 N.E.2d 714, 716-18 (Mass. Ct. App. 2001) (explaining that denial of motion for new trial will often be consolidated with the direct appeal). Tenn.: *State v. Blackmon*, 78 S.W.3d 322, 328 (Ten. Crim. App. 2001). Wis.: *Evans*, 682 N.W.2d at 793-95.



claim.<sup>5</sup> Although these States vary in the extent to which they encourage inmates to assert ineffective-assistance claims through a motion for a new trial, all of them offer that vehicle. Five additional States allow defendants, during direct review, to ask for a remand to allow the trial court to develop a factual record to support an ineffective-assistance claim.<sup>6</sup>

Twenty-seven States entertain ineffective-assistance claims on direct appeal if those claims are based on the trial record; and entertain ineffective-assistance claims on collateral review if the claims require further evidentiary development. In some of those States, prisoners can assert even their record-based ineffective-assistance claims on collateral review;<sup>7</sup> in others, prisoners must raise their ineffective-

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<sup>5</sup> Ala.: *Ex parte Ingram*, 675 So. 2d at 866. Ark.: *Rounsaville*, 288 S.W.3d at 217. Cal.: *People v. Wilson*, 838 P.2d 1212, 1217 (Cal. 1992). Ill.: *People v. Steidl*, 685 N.E.2d 1335, 1340 (Ill. 1997). Ky.: *Humphrey*, 962 S.W.2d at 872. La.: *Ratcliff*, 416 So. 2d at 530. Mass.: In Massachusetts, the motion for new trial is the collateral proceeding. In most cases, the denial of that motion is reviewed on direct appeal, which is often stayed while the trial court considers the motion. *Montgomery*, 759 N.E.2d at 718 & n.9. On occasion, the denial of the motion is appealed after direct review has concluded. *Id.* at 718. Pa.: *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002). Tenn.: *Honeycutt*, 54 S.W.3d at 766-69. Wis.: In Wisconsin, a defendant may assert an ineffective-assistance claim on collateral review if he did not file a direct appeal or if he shows cause and prejudice for having failed to include the claim in his direct appeal. *Evans*, 682 N.W.2d at 795.

<sup>6</sup> Kan.: *State v. Van Cleave*, 716 P.2d 580, 582-83 (Kan. 1986). N.M.: *State v. Roybal*, 54 P.3d 61, 67 (N.M. 2002). Okla.: *Berget v. State*, 907 P.2d 1078, 1085 (Okla. Crim. App. 1995). Utah: *State v. Litherland*, 12 P.3d 92, 97-98 (Utah 2000). Wyo.: *Calene v. State*, 846 P.2d 679, 692 (Wyo. 1993).

<sup>7</sup> Colo.: *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003); *Downey v. People*, 25 P.3d 1200, 1202 n.3 (Colo. 2001). Del.: *Duross v. State*,

assistance claims at the first available opportunity;<sup>8</sup> and in still others the prisoners may choose whether to file their ineffective-assistance claims on direct appeal or through a collateral proceeding. In a few of these States, such claims are heard on direct appeal only in extraordinary circumstances.<sup>9</sup> In all of these States,

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494 A.2d 1265, 1268-69 (Del. 1985). Fla.: *Wuornos v. State*, 676 So. 2d 972, 974 (Fla. 1996); *Foster v. State*, 387 So. 2d 344, 345-46 (Fla. 1980). Idaho: *State v. Yakovac*, 180 P.3d 476, 482 (Idaho 2008). Ind.: *Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008). Iowa: *State v. Clark*, 814 N.W.2d 551, 567 (Iowa 2012). Md.: *In re Parris W.*, 770 A.2d 202, 207 (Md. 2001). Nev.: *Pellegrini v. State*, 34 P.3d 519, 534-35 (Nev. 2001). N.H.: *State v. Thompson*, 20 A.3d 242, 255 (N.H. 2011). N.J.: *State v. McQuaid*, 688 A.2d 584, 594-95 (N.J. 1997); *State v. Preciose*, 609 A.2d 1280, 1285 (N.J. 1992). N.D.: *State v. Fraser*, 608 N.W.2d 244, 250 (N.D. 2000). S.C.: *State v. Felder*, 351 S.E.2d 852, 852 (S.C. 1986). Vt.: *State v. Bacon*, 658 A.2d 54, 66 (Vt. 1995); *State v. Judkins*, 641 A.2d 350, 352 (Vt. 1993). Wash.: *State v. McFarland*, 899 P.2d 1251, 1257 (Wash. 1995). W.V.: *State v. England*, 376 S.E.2d 548, 560 (W. Va. 1988).

<sup>8</sup> Ga.: *Garland v. State*, 657 S.E.2d 842, 844 (Ga. 2008); *White v. Kelso*, 401 S.E.2d 733, 734 (Ga. 1991). Haw.: *State v. Silva*, 864 P.2d 583, 592-93 (Haw. 1993); *Briones v. State*, 848 P.2d 966, 975 (Haw. 1993). Minn.: *Leake v. State*, 737 N.W.2d 531, 535-36 (Minn. 2007). Miss.: *Brown v. State*, 948 So. 2d 405, 408 (Miss. 2006); *Read v. State*, 430 So. 2d 832, 841-42 (Miss. 1983). Mont.: *State v. Upshaw*, 153 P.3d 579, 587 (Mont. 2006). Neb.: *State v. Suggs*, 613 N.W.2d 8, 11 (Neb. 2000). N.Y.: *People v. Maxwell*, 933 N.Y.S.2d 386, 387 (N.Y. App. Div. 2011); *People v. Mobley*, 873 N.Y.S.2d 736, 737 (N.Y. App. Div. 2009). N.C.: *State v. Fair*, 557 S.E.2d 500, 524-25 (N.C. 2001). Ohio: *State v. Lentz*, 639 N.E.2d 784, 785-86 (Ohio 1994).

<sup>9</sup> Alaska: *Barry v. State*, 675 P.2d 1292, 1295 (Alaska Ct. App. 1984) (direct appeal appropriate only in "rare[]" case "when 'plain error' appears in the record"). Conn.: *State v. Crespo*, 718 A.2d 925, 937-38 (Conn. 1998) (review of ineffective-assistance claims on direct appeal has been limited "to allegations that the defendant's sixth amendment right had been jeopardized by the actions of the trial court, rather than by those of his counsel"). S.D.: *State*

some but not all ineffective-assistance claims are channeled to collateral proceedings.

The question before the Court, then, is whether *Martinez*'s modification of procedural-default doctrine applies virtually nationwide, or is for now limited to the six States to which it initially applied.

## **II. *Martinez* Should Not Be Extended to States that Do Not Bar Direct Appeals of All Ineffective-Assistance-of-Counsel Claims.**

### **A. The rationale of *Martinez* does not require its extension to the other States.**

Texas comprehensively explains why *Martinez*'s rationale does not apply to inmates sentenced to death in Texas. See Texas Br. 22-58. These inmates receive new counsel who are given the opportunity to challenge trial counsel's effectiveness through a motion for a new trial, to expand the record in pressing that motion, and to obtain review of that claim on direct appeal. The circumstances that prompted the Court in *Martinez* to create a limited exception to the procedural-default doctrine do not apply there.

Because every State's post-conviction process is unique, we cannot definitively assess the potential impact of a ruling adverse to Texas. We think it safe to say, however, that a decision holding that *Martinez* applies to Texas capital cases will mean that *Martinez*

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*v. Hannemann*, 823 N.W.2d 357, 360-61 (S.D. 2012) (ineffective-assistance claims must be brought in state habeas action unless "trial counsel was so ineffective and counsel's representation so casual as to represent a manifest usurpation of [the defendant's] constitutional rights") (internal quotation marks omitted).

applies to many, if not most, of the other 43 States.<sup>10</sup> That is a step this Court should hesitate to take.

**B. Difficulties created by *Martinez* counsel against its expansion.**

In *Martinez* this Court exercised its equitable judgment after weighing the interests supporting the *Coleman* rule and the prisoner's interests in having his defaulted ineffective-assistance claim heard by a federal habeas court. 132 S. Ct. at 1318. When considering whether to extend *Martinez* in its equitable discretion, the Court should bear in mind the extent to which that "qualification of *Coleman*" undermines many of the reforms Congress instituted through AEDPA and the additional burdens it places on States.

1. Congress enacted AEDPA based on its recognition that "[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998)). AEDPA helps ensure that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Ibid.*

AEDPA accomplishes this, in part, through 28 U.S.C. §2254(d) and its interaction with the exhaustion doctrine. As the Court explained in *Richter*, "[i]f the state court rejects the claim on procedural grounds, the claim is barred in federal court unless" an exception to the procedural default doctrine applies. 131 S. Ct. at

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<sup>10</sup> This analysis assumes the Court does not draw a distinction, for purposes of applying the *Martinez* rule, between capital and non-capital cases. Nothing in *Martinez*, a non-capital case, suggests such a distinction.



787. "And if the state court denies the claim on the merits, the claim is barred in federal court unless one of the exceptions to §2254(d) set out in §§2254(d)(1) and (2) applies." *Ibid.*

The end result is that, with only limited exceptions, federal courts no longer assess habeas claims on a *de novo* basis. The vast majority of claims will be subject to deferential review under §2254(d) or will have been procedurally defaulted. And because "review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits," *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011), federal habeas courts will only rarely conduct evidentiary hearings. *Id.* at 1401 (noting that federal habeas courts will conduct evidentiary hearings under §2254(e)(2) only when they are assessing claims that state courts did not address on the merits yet were not procedurally defaulted).

*Martinez* creates a vast exception to those rules, in the States where it applies. Ineffective-assistance claims are the most common claims asserted by state prisoners in state and federal habeas proceedings. See Roger A. Hanson & Henry W.K. Daley, U.S. Dep't of Justice, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 14 (1995); Victor E. Flango, *HABEAS CORPUS IN STATE AND FEDERAL COURTS* 47 (1994). Indeed, half of all federal habeas petitions filed by state prisoners include an ineffective-assistance claim. Nancy J. King *et al.*, *FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS* 28 (2007).

Under *Martinez*, many if not most of these ineffective-assistance claims will fall in what had previously been a small category — claims that were defaulted in

state court but may still be heard on federal habeas. And, critically, neither §2254(d) nor the accompanying limitation of review to the state record applies to those claims.

Prior to *Martinez*, it was safe to say that AEDPA operated in the manner Congress intended, with §2254(d) deference given to the vast majority of claims reviewed on federal habeas. That may no longer be true in the jurisdictions where *Martinez* applies.

2. It is no response to say that States could solve these problems simply by providing counsel in all collateral-review proceedings. First, States have finite resources: funds shifted to pay for collateral counsel are taken from other programs, including services for indigent defendants. States are experiencing budget crises nationwide, and services for indigent defense are already stretched thin. See Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. Rev. 791, 826-27 (2009).

Second, and in any event, providing collateral-review counsel to inmates would not solve the problems discussed above. *Martinez* excuses the defaults not only of pro se litigants but also of counseled inmates. As a consequence, any time collateral counsel chooses not to present a particular ineffective-assistance claim on collateral review, the inmate may argue on federal habeas that this default should be excused because his counsel was ineffective.

This produces a lengthier, more complex federal habeas proceeding than where the inmate litigated pro se on state habeas. Not only must the federal habeas court assess whether the defaulted ineffective-assistance claim was “substantial,” it must also deter-



mine whether collateral-review counsel was ineffective for failing to assert it — a complicated inquiry involving retrospective assessments of counsel's tactical decisions years earlier.<sup>11</sup>

And all of this effort is in service of claims that, particularly in non-capital cases, "are almost always unsuccessful." Hoffman & King 797. Professors Hoffman and King have found not only that barely one-third of one-percent of habeas petitions are granted in non-capital cases. *Id.* at 809. They further found that ineffective-assistance claims in particular only rarely succeed. *Id.* at 811 (citing study finding only one successful ineffective-assistance claim out of about 1200 raised).

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<sup>11</sup> The two inquiries — whether the claim was "substantial" and whether collateral counsel was ineffective for failing to assert it — are not identical. *Martinez* described a "substantial" claim as a "claim that has *some* merit," 132 S. Ct. at 1318 (emphasis added), which presumably differs from "a claim that has merit," *i.e.*, that prevails after full review. This reading is supported by the Court's citation to *Miller-El v. Cockrell*, 537 U.S. 322 (2003), for its description of the standards for certificates of appealability (COA). As *Miller-El* explained, a court deciding whether to issue a COA undertakes a "threshold inquiry" and does not decide the "merits of appeals"; the court should issue a COA when "a claim [is] debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 336, 338.

Collateral-review counsel may well have sound tactical reasons not to assert an ineffective-assistance claim that she concludes is debatable but will ultimately fail on the merits. See *Jones v. Barnes*, 463 U.S. 745, 746, 753 (1983) ("defense counsel assigned to prosecute an appeal from a criminal conviction" does not have "a constitutional duty to raise every nonfrivolous issue requested by defendant"; "A brief that raises every colorable issue runs the risk of burying good arguments . . .").

Professors Hoffman and King's proposed solution to the flood of meritless ineffective-assistance claims is not to provide collateral counsel but to "redirect resources . . . to the beginning, not the end, of the criminal justice process," that is, to improving defense representation at trial. *Id.* at 818. Expanding *Martinez* leaves still fewer funds available for that kind of reform.

3. *Martinez* also increases the likelihood that ineffective-assistance claims will be addressed many years after the trial, when trial counsel's memories of why she pursued particular tactics have long faded.

Ineffective-assistance claims are notoriously hard to litigate because of the built-in conflicts faced by trial counsel and the "difficulties inherent" in evaluating counsel's performance given "the distorting effects of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689 (1984); Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty in Capital Litigation*, 31 Hofstra L. Rev. 1181, 1191-93 (2003) (noting trial counsel's dilemma of whether to "fall on his or her sword, admit ineffectiveness and suffer the ignominy and shame that follows" in order "to help the former client"). Matters are made only worse when the litigation takes place years after trial.

By that time, "the offending attorney likely has little memory of a particular case, given that she has had hundreds like it in the interim." Eve Primus, *Structural Reform in Criminal Defense*, 92 Cornell L. Rev. 679, 695 n.88 (2007). Her ability to recall why she decided not to call a particular witness, not to object to a particular piece of evidence, or not to pursue a particular line of inquiry will necessarily be diminished if not gone altogether. And, of course, if relief is granted

the “[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible.” *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982).

Those concerns make federal habeas a particularly poor forum in which to address ineffective-assistance claims. More than five years typically elapse from sentence to the filing of a federal habeas petition in non-capital cases, even excluding cases dismissed as time-barred. *Hoffman & King* 806-07. Yet *Martinez* increases the likelihood that ineffective-assistance claims will be heard on federal habeas rather than during the state appellate or collateral-review process.

At the very least, *Martinez* removes the incentive the procedural-default rule supplies to raise an ineffective-assistance claim in a state collateral proceeding. See *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977) (finding that procedural-default rule discourages “sandbagging”). A petitioner who appeared pro se in state court automatically obtains federal habeas review of the claim if it has “some merit”; and a petitioner with counsel in state court goes a long way toward obtaining federal review of his claim upon such a showing. Giving state courts the first opportunity to assess the claim is no longer the price of admission for federal habeas review.

Before AEDPA, inmates and their counsel may have had no reason to withhold a claim from state court — even if they thought the state court disfavored ineffective-assistance claims, two bites at the apple are always better than one. AEDPA deference, however, changes that dynamic. Now the choice is between (1) review by a state court and then review by a federal court under the deferential standard of §2254(d), and

(2) no state court review but *de novo* federal review. Many collateral counsel will select the second option if they believe the state courts in their jurisdiction are less receptive to inmates' claims than their federal counterparts. Cf. Lynn Adelman, *Federal Habeas Review of State Court Convictions: Incoherent Law But an Essential Right*, 64 Maine L. Rev. 380, 386-89 (2012) (arguing that "there is a substantial difference between having the claim heard by a judge or judges with life tenure and a judge or judges who must be re-elected or re-appointed," and concluding that "many defendants likely have a better chance before a life-tenured federal judge than they have in a state court").

All of this disservices the state interests served by the procedural-default doctrine: respecting "States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *Engle*, 456 U.S. at 128; providing state courts "an opportunity to correct [their] own errors," *Coleman*, 501 U.S. at 750; and bringing finality to the victim and society. *Ibid.*

\* \* \*

Given the concerns with *Martinez* outlined above, the prudent course would be not to extend it nationwide.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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**Dated: JANUARY 2013**